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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

MARCH AND OCTOBER TERMS, 1919.

VOL. 121.

REPORTED BY

ROBERT POWELL

COLUMBIA, MO.
E. W. STEPHENS PUBLISHING CO.
LAW PUBLISHERS
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CASES ARGUED and DETERMINED.

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1919.

CONTINENTAL CASUALTY CO. *v.* HARDENBERGH.

[83 South. 278, In Banc. No. 20887.]

1. INSURANCE. *Validity of clause restricting recovery.*
A clause in an insurance policy providing that where the accidental injury causing the loss, or the loss itself results from freezing by the insured while not engaged in his occupation, the recovery shall be limited to one-eighth the usual amount, is valid.

2. INSURANCE. *Evidence sufficient to establish death by freezing.*
Where the evidence showed that insured went hunting and was found next morning lying on his back with a part of one leg in a marshy hole and his body frozen, these facts did not warrant the jury in finding that his death was proximately caused by getting his foot caught, but only established that his death was caused by freezing and he was only entitled to recover one-eighth the usual amount under a policy so providing.

APPEAL from the circuit court of Copiah county.

HON. D. M. MILLER, Judge.

Suit by Mrs. Jennie Hardenbergh against the Continental Casualty Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

G. Q. Whitfield, R. N. & H. B. Miller, Manton Maverick, M. P. Cornelius, Geo. R. Sanderson and *Murphy O. Tate,* for appellant.

M. S. McNeil, for appellee.

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SYKES, J., delivered the opinion of the court.

The appellee, plaintiff in the circuit court, sued and recovered a judgment against the appellant for one thousand dollars for the death of her son Levy Hardenbergh, as the beneficiary under the conditions and clauses of an accident insurance policy issued by the appellant company to the deceased. The material parts of this policy are as follows:

"The Continental Casualty Company—Incorporated by the state of Indiana as a stock company. Old Line Plan. General Office, Chicago, Illinois (hereinafter called the company) —In consideration of the warranties and agreements contained in the application hereof and the payment of premium as therein provided, does on this 24th day of December, A. D. 1917, hereby insure Mr. Levy Hardenbergh (hereinafter called the insured) in class Spl. —— of the company, as a water service man, in the principal sum of one hundred dollars, with weekly indemnity of ten dollars, and subject to the conditions hereinafter specified promises to pay to the insured or to his beneficiary, Jennie Hardenbergh, his mother, indemnity as scheduled below, in the event that said insured, while this policy is in force, shall receive personal, bodily injury, which is effected directly and independently of all other causes through external, violent, and purely accidental means (suicide, sane or insane, not included), and which causes at once total and continuous inability to engage in any labor or occupation, and provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease, or infirmity of the insured.

"Specific Indemnity.

"Part I. If, within ninety days from the date of the accident, any one of the following losses shall result necessarily and solely from such injury as is before described, the company will pay in lieu of any other indem-

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nity and within ninety days from the furnishing of proof: A. For loss of life, said principal sum. . . .

"Special Indemnities.

"Part III. A. In any of the losses covered by this policy and specified in parts I or II; . . . or (3) where either the accidental injury causing the loss or the loss itself results from any poison, asphyxiation or gas, or from fits, vertigo, somnambulism, or intoxication, or from sunstroke or freezing sustained by the insured while not engaged in his occupation; . . . then and in all cases referred to in this paragraph A. of part III, the amount payable shall be one-eighth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained."

This policy was in effect at the time of the death of the insured.

The facts relating to the death are undisputed and present a very pathetic picture. The insured went duck hunting on the morning of December 28, 1917, at a small station on the Illinois Central Railroad a few miles north of New Orleans, named La Branche. There was a hunting club house at this place, and the keeper upon parting with the deceased that morning agreed to meet him at a certain point at 5 o'clock in the afternoon. The hunting ground was over a marshy swamp practically covered with water. The deceased wore hip boots and carried his gun and ammunition. It was a very cold day, and the wind was blowing almost a gale during the day. The thermometer stood at about ten degrees above zero. The deceased failed to keep his appointment that afternoon with the lodgekeeper. A fruitless search was made by the keeper and others for the deceased until midnight that night. Signal lights were also displayed to guide the deceased to his place of destination. The next morning a party of searchers was led to the body of the

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deceased by a hunting dog which belonged to the gamekeeper, but had accompained the deceased on the hunt. The deceased was lying on his back dead about one hundred and fifty yards from the agreed meeting point with the gamekeeper. The water around his body had frozen. His face and the upper part of his body were not submerged, however. The body itself was frozen stiff. The left leg was sunk to the knee in a hole of some kind, and there was some little trouble in extricating it. There were one or two empty shells near the body, indicating that the deceased had fired his gun after getting his foot caught in this hole. About a mile from the body was found a string of twenty-one ducks evidently killed by the deceased in his hunt of that day. The undisputed testimony shows that the body of the deceased was frozen stiff, and that the water around his body had become frozen, and the ice had to be broken before it could be moved. The faithful dog had remained with the deceased all night, and the dog hair upon the clothing of the deceased showed that the dog had slept on the chest of the deceased.

It was the contention of the appellee in the lower court, and is his contention here, that it was a question of fact to be decided by the jury whether or not the proximate cause of the death of the deceased was getting his foot caught and mired up in the hole. The jury adopted this theory and returned a verdict in favor of the appellee for one thousand dollars.

The appellant contends that the uncontradicted testimony shows that the deceased met his death by freezing, and that under the terms of the policy above set out only one-eighth of the principal sum can be recovered. The insuring clause of this policy provides that where the insured shall receive personal injury which is effected directly and independently of all other causes, etc. Under part III, caption "Special Indemnities," and eliminating those parts not material to this issue, clause 3 reads as follows:

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"Where either the accidental injury causing the loss or the loss itself results from . . . freezing sustained by the insured while not engaged in his occupation."

Under this clause the insurer is liable for only one-eighth of the amount of the policy: First, where the injury causing the loss results from freezing; or, second, where the loss itself results from freezing. This clause of the policy is plain and unambiguous. It is a valid and binding clause. The parties to the contract were *sui juris* and had the right to make a contract with this clause therein. The uncontradicted facts in this case conclusively shows that the death was the result of freezing, and under the plain terms of the insurance contract above set out the recovery must be limited to one-eighth of the principal amount. Judgment will be entered here in favor of the appellant for this sum, namely, one hundred and twenty-five dollars with interest.

The judgment of the lower court is reversed, and judgment entered here for the appellee.

Reversed, and judgment here.

COOK v. CITY OF PASCAGOULA.

[83 South. 305, In Banc. No. 20899.]

1. MUNICIPAL CORPORATIONS. *Ordinance imposing penalty greater than provided by state law.*

A provision in a municipal ordinance providing that all offenses against the state penal laws amounting to a misdemeanor shall be offenses against the municipality when committed within the corporate limits, and further providing that any person violating such ordinance shall, upon conviction, be fined not less than one dollar or more than one hundred dollars, or imprisoned in jail not to exceed one year or both, is void as undertaking to impose a penalty which in some cases would be in excess of the penalty provided by the state laws for the same offense.

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2. SAME.

But such excessive penalty so provided will not invalidate the whole ordinance, since section 3419, Code 1906, provides the penalty to be imposed for violation of city ordinances.

3. MUNICIPAL CORPORATIONS. *General ordinances on subject of offenses self operating.*

Where a municipality takes advantage of section 3410, Code 1906, by adopting a general ordinance on the subject of offenses against the municipality, such ordinance so adopted is self operating.

APPEAL from the circuit court of Jackson county.

HON. D. M. GRAHAM, Judge.

Hattie Cook was convicted of violating a city ordinance prohibiting the possession of intoxicating liquors and appeals.

The facts are fully stated in the opinion of the court.

F. S. McInnis for appellant.

The only question presented by this appeal is the validity, or legality of Ordinances No. 1915-17 of the city of Pascagoula, which is set out at length in the record. The ordinance is a general one adopted under the authority of section 3410 of the Code of 1906, and makes all offenses against the city of Pascagoula when such offenses are committed within the corporate limits of the city of Pascagoula and provides a penalty for the violation thereof.

The ordinance consists of three sections. Section one and section three can be eliminated from this discussion, as section two is the one which we contend makes the ordinance void. Section 3410 of the Code of 1906, provides that all offenses against the law of the State, amounting to misdemeanors, may, when so provided by a general ordinance of a municipality, be made offenses against the municipality, as though such offenses were made offenses against the unicipality by separate ordinance in each case, "and upon conviction thereof the

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same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal croproations."

In this case the court fatally erred in imposing a penalty greater than the maximum that can be imposed by municipalities when a fine of one hundred and ten dollars was imposed on the appellant, section 3348. Code of 1906; further the sentence to the county jail is not within the power of the court in cases of this character. The sentence must be to the city jail.

The power conferred on municipalities of the state by the provisions of section 3410, Code 1906, must be strictly construed. This is true of all powers conferred on municipalities by statutes. The municipality can go no further than the statute permits it to go. When the power to pass an ordinance is given by statute, and the municipality undertakes to exercise that power it is bound to exercise it in the manner and form prescribed by statute, and in the event that the ordinance exceeds the power conferred it is void. When the legislature gave the power to a municipality to pass such an ordinance as is here under consideration it also limited the power in that it was provided that the punishment should be the "same" as is provided by the state law in regard to such offenses. This ordinance oversteps that limitation and fixes the punishment for a violation of the ordinance at a fine of not less than one dollar or more than one hundred dollars, or imprisonment not more than thirty days, or both. Not a word said in the ordinance about the punishment for a violation of the same to be the same as is provided for a violation of the state law.

There are innumerable crimes, almost where the law fixes a punishment for committing them at less than one hundred dollars. A violation of the Sabbath for instance.

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Sections 1367 and 1368, Code of 1906, provide a fine of not less than twenty and not more than fifty dollars. Section 1370, Code of 1906, provides a penalty for hunting or fishing on Sunday of not less than five nor more than twenty dollars. Under the provisions of the ordinance in question for any of the offenses above named a person could be fined one hundred dollars and thirty days in jail. Or under the last one cited, one could be fined one dollar, when the statute defining the crime fixes the punishment at not less than a fine of five dollars. Another striking instance is in the punishment of the crime of vagrancy. Under the ordinance here the court trying a vagrant could fine him one dollar; the punishment fixed by the statute is different. Under the ordinance here the court trying a vagrant could not impose any legal penalty.

We submit that the penalty section of the ordinance makes the whole ordinance absolutely void. It exceeds the power conferred by the statute in that it undertakes to provide a different punishment for a violation of the ordinance than that prescribed by the statute giving the municipality the power to adopt the character of ordinance as the one here attempted to be adopted. It is well settled that a municipality cannot impose a penalty greater than the one the statute authorizes it to impose.

The statute giving this power expressly states what the punishment for a violation of the ordinance shall be. The ordinance adopted, and now in question, undertook to impose an entirely different penalty. The statute expressly states that "upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state." The ordinance says absolutely nothing in reference to that, but fixes the punishment at a fine of not less than one

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dollar, nor more than one hundred dollars, or imprisonment not more than thirty days, or both.

We submit that the court below erred in admitting the ordinance in evidence, because it is absolutely void, and that the defendant should be here discharged.

A. *W. Dent,* Assistant Attorney-General, for the state.

The only error argued by counsel for the appellant in his brief is the validity or legality of Ordinances 1915-17 of the city of Pascagoula, which is set out in full for the convenience of court in the statement of facts herein. It is insisted that the court erred in permitting this ordinance to be introduced in evidence.

Section 2 of this ordinance is the section which the counsel for the appellant contends makes the ordinance void. The ordinance is a valid ordinance and the court did not err in permitting the state to introduce it in evidence. *Smothers* v. *Jackson,* 92 Miss. 327, 45 So. 982; 100 Miss. 249, 56 So. 386.

After the mayor and the board of aldermen adopted this blanket ordinance, under section 3410 of the Code of 1906 (Hemingway's Code, section 5940), the statute fixes the penalty. It provides: "Upon conviction . . . the same punishment shall be imposed by the city, town or village as is provided by the law of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal corporations."

Section 3348 of the Code, of 1906, which section 5845 of Hemingway's Code, fixes the maximum fine at not exceeding one hundred dollars or the maximum imprisonment not exceeding thirty days. According to the judgment of the circuit court, the fine was fixed on appellant at one hundred and ten dollars, which is in excess of the maximum fixed by section 3448, *supra.* The appellant is not entitled to a new trial because the court fixed the fine at ten dollars in excess of the

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maximum penalty which may be imposed by municipal corporations, but the case should be remanded for the proper fine to be imposed by the court.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a conviction in the circuit court under an ordinance of the municipality of Pascagoula making it unlawful to possess intoxicating liquor. The only question presented by the appeal is the validity of the municipal ordinance involved and the legality of the penalty imposed.

The municipal ordinance under which the conviction was had was legally adopted in all respects and reads as follows:

"Section 1. That all offenses against the penal laws of the state of Mississippi amounting to a misdemeanor shall also be offenses against the city of Pascagoula, Mississippi, when committed within the corporate limits thereof.

"Sec. 2. That any person violating the provisions of this ordinance shall, upon conviction, be fined not less than one dollar nor more than one hundred dollars, or imprisonment in jail not to exceed thirty days, or both fine and imprisonment."

Upon trial and conviction of appellant, the court imposed a fine of one hundred and ten dollars and ten days in jail. It is urged by the appellant that the penalty imposed is void, because it is in excess of a fine of one hundred dollars; that the whole ordinance is void because it imposes a penalty of a fine of not less than one dollar or more than one hundred dollars for all offenses; and that the penalty imposed by section 2 of the ordinance is void and invalidates the entire ordinance because a maximum penalty of one hundred dollars and thirty days' imprisonment is imposed in the ordinance for conviction of any and all of the misdemeanors

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named in the state statutes, whereas some of the offenses prescribed by the state laws, such as Sabbeth violations, are punishable under the statutes with a less maximum penalty than one dollar to one hundred dollars fine and thirty days' imprisonment, as imposed by section 2 of the ordinance here in question.

We here quote sections 3410 and 3348, Code of 1906:

"3410. All offenses under the penal laws of the state amounting to a misdemeanor shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town or village in whose corporate limits the offense may have been committed to the same effect as though such offenses were made offenses against the city, town or village by separate ordinance in each case, and upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal corporations."

"3348. To pass all ordinances, and to enforce the same by fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days or both."

It will be observed that the municipal ordinance here involved is a general ordinance of the municipality providing that all offenses against the penal laws of the state of Mississippi amounting to a misdemeanor shall also be offenses against the city of Pascagoula when committed within the corporate limits. This general or "blanket" ordinance is in pursuance of and in accord with section 3410, Code of 1906, which provides that such enactment by the municipality shall be as effectual as a separate ordinance in each case, and that upon conviction the same punishment shall be imposed by the municipality as is provided by the laws of the state with regard to such offenses against the state, not in excess, however, of the maximum penalty which may be

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imposed by municipal corporations under section 3348, Code of 1906.

We are of the opinion that section 2 of the municipal ordinance, which undertakes to impose a penalty which in some cases is and would be in excess of the penalty provided by the laws of the state with regard to the same offense against the state, is void and of no force. In order for the penalty to be legal and valid, it must be such as may be legally and validly imposed upon conviction of any offense named in the ordinance. Because the penalty imposed would not be in excess of that provided by the state law for the same offense in any particular case, the one here, for instance, could not cure the fatal infirmity in section 2 of the ordinance, because the court is not authorized to make separate applications of the penalty and hold that it is a valid penalty in one case and not in the other, as they may arise; but if the maximum or minimum penalty prescribed in the ordinance here is contrary to the penalty prescribed by the state laws for such offenses, then the penalizing portion of the ordinance is void and must be stricken out.

However, we find no difficulty here in upholding the ordinance making the state offenses violations against the municipality, because the ordinance is valid and may stand without section 2 imposing the void penalty. Section 2 is a useless and unnecessary provision in view of section 3410 of the Code. We think it reasonable to conclude that the municipality would have enacted section 1 of the ordinance without section 2, because section 3410 of the Code prescribes the penalty to be imposed for violations of the ordinance.

Therefore when the municipality adopted the general ordinance providing that offenses against the state should be municipal offenses, it then and there fully read into the ordinance sections 3410 and 3348, Code of 1906, which plainly provide that the "blanket" ordinance

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shall serve in the place of separate ordinances for each offense; and that upon conviction by the municipality the same punishment shall be imposed by the municipality as is provided by the laws of the state upon conviction by the state. Of course, in no event could the maximum penalty exceed a fine of one hundred dollars and thirty days' imprisonment. Thus it will be seen that when a municipality takes advantage of the provision in section 3410, Code of 1906, by adopting a general ordinance on the subject of offenses against the municipality, the ordinance so adopted is self-operative, or we may say operates automatically, because the statute, section 3410, plainly provides the penalty in all cases of conviction by the municipality. Consequently, we hold that the ordinance here in question is valid, and that the penalty to be imposed upon conviction in each case by the municipality is the same penalty imposed by the state for conviction in like cases; the maximum penalty being a one hundred dollar fine and thirty days' imprisonment.

The fine of one hundred and ten dollars imposed in this case is excessive to the extent of ten dollars and for that reason we must reverse the judgment of the lower court so that the proper penalty under the law may be imposed by the court. In all other respects the judgment of the lower court is affirmed.

Reversed as to penalty; affirmed otherwise.

Reversed.

Affirmed.

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ROBERTSON, STATE REVENUE AGENT, v. UNITED STATES NURSERY CO.

[83 South. 307, In Banc. No. 20775.]

1. TAXATION. *Bank taxes on capital stock invested in property taxed valid.*

The mere fact that all the capital stock of a corporation operating a plantation and nursery has been invested in real and personal property which has been assessed and subjected to taxation constitutes no bar to a back assessment upon any portion of its capital stock, where the corporation has neither been assessed upon capital stock *eo nomine*, nor paid taxes upon the value of its capital stock as such.

2. TAXES. *Deduction of assessed value in back. Assessing capital stock.*

In a proceeding to back assess the capital stock of a corporation the total assessed value of its real and personal property should be deducted from the value of its stock.

3. TAXATION. *Presumption as to regularity of assessment.*

Both the state revenue agent and the tax assessor are public officers and the general legal presumption that they have regularly and accurately performed their duties must ordinarily be indulged.

4. TAXATION. *Presumption of regularity on disapproval by supervisors.*

This presumption is not affected because the board of supervisors have disapproved an assessment made by them.

5. TAXATION. *Insufficiency of evidence to overcome presumption of regularity of assessment.*

In a proceeding to back assess the capital stock of a corporation wherein it appeared that such capital stock had been invested in real and personal property which had already been subjected to taxation, since under Code 1906, section 4267 (Hemingway's Code, section 6901), it was the duty of the corporate officer to furnish information to the assessor so that the value of the stock might be ascertained with some certainty, the court held that the evidence in this case was not sufficient to overcome the *prima-facie* showing by the taxing officers that they had performed their duty in imposing the assessment under Code 1906, section 4740 (Hemingway's Code, section 7058).

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6. SAME.

The court held the evidence in this case sufficient to show the market value of the stock so as to allow a deduction therefrom of the total assessed value of the real and personal property.

7. TAXATION. *Disallowance of assessment by supervisors as res judicata.*

Where the board of supervisors had disallowed a back assessment of the capital stock of a corporation while sitting in one of the two districts of the county in violation of Laws 1892, chapter 93, section 12, this did not support a plea of *res adjudicata* in a subsequent back assessment proceeding directed against the same stock at a sitting in the proper district of the county.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, JR., Judge.

Proceeding by Stokes V. Robertson, State revenue agent, against the United States Nursery Company to bask assess defendant on its capital stock. The board of survivors disallowed the assessment, and on appeal to the circuit court, a peremptory instruction was granted the corporation and the state revenue agent appeals.

The facts are fully stated in the opinion of the court.

Wells, Robinson & Jones, for appellant.

This court, in the case of *Peoples' Warehouse* v. *Yazoo City,* 97 Miss. 500, laid down the rule that the market value of the capital stock, less the value of the real and personal property, was the value of the franchise. So, in the case at bar, our contention is that the market value of the capital stock of appellee is fifty-eight thousand, three hundred and twenty dollars, and after deducting the assessed value of all real and personal property, an untaxed value of capital stock, in excess of forty-six thousand remains and since the court, in the *Warehouse Case, supra,* this was the value of the franchise element of the capital stock, we adopt this term.

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Appellee insists upon section 4267. No vestige of any showing is made that the appellee ever attempted to follow this section, but on the contrary, never, at any time, was any assessment of capital stock, as such, on the assessment roll. Appellant cannot claim double taxation of the capital stock by reason of this additional assessment, since the capital stock was never assessed for the first time on the roll. But, says appellee, the property which was represented by capital stock assessment, was assessed as land and personal property and therefore, you must not hold me literally to section 4267 which requires the assessment to be made against the capital stock.

In the case of *Adams* v. *Bullock, supra,* cited by appellee, the appellee in that case carried his capital stock investment on the personal roll in the column called "Capital invested in merchandising and manufacturing." The court said there: "The real question presented for decision is: where property is listed for taxation under the description of 'capital invested in merchandise and manufacturing' can it be said that the value of this franchise is included?"

The court held that the franchise value was not so included; and it follows, therefore, that the assessment of lands and personal property did not, and cannot, in the nature of this case, include the value of the franchise of the United States Nursery Company.

In the *Simmons Case,* 70 Miss., on page 501 the court said: "It is also evident that taxation of its real and personal property in specie is not taxation of all the various elements of value, for this would exclude in all cases the value of the franchise, etc."

It must follow, therefore, that the appellee is forced to the situation where the argument can no longer be made that the assessment of its real and personal property in specie was a taxation of all its taxable values.

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But, says appellee, again admitting that what you say is true, that a franchise is taxable, and that the assessment of all of our property as lands and personal property does not operate as an assessment of capital stock, as required by section 4276, still, you have not separately assessed our franchise, and you must assess the franchise *eo nomine* under this section, and the *Bullock case, supra.*

Section 4267 does not require the various elements comprising the cash market value of the capital stock to be assessed *eo nomine.* The word "franchise" nowhere appears in this section. On the contrary, the statute says: "The capital stock of such company or corporation shall be assessed to it for taxation to the extent of the full amount of the value thereof, etc. . ."

This section does require, and nothing more, that the capital stock shall be assessed at its cash market value, less the assessed value of the real estate. So, in the case at bar, the proper assessment would have been for the year 1910, capital stock, forty-six thousand, six hundred and ten dollars."

The value of capital stock is an aggregate of the various elements of value, among the number being franchise value, and so in assessing the capital stock at its cash market value all of the various elements of taxable value must be included in the assessment of capital stock, and this is exactly what the court meant in the case of *Adams* v. *Bullock, supra.*

This phase of the case, in its final analysis, comes down to the proposition already adverted to, viz: Must the franchise be assessed *eo nomine,* or does the assessment of capital stock, at its cash market value, include every possible value to be assessed?

This matter is not difficult to determine; we submit we have already attempted to show that the very terms of section 4267 contemplate the assessment of capital stock as a whole, and not in its various and varying

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constituent elements. The divers and sundry elements of value would vary with the different kinds of corporations to be assessed. No assessment roll could be prescribed by which a column could be set apart for the different elements of value of the many kinds of personal property that corporations might own. If the franchise must be assessed by name so would every other item of personal property going to make up the aggregate market value of the capital stock.

We are not limited, however, to our own opinion as to the right to back assess the franchise under the heading of "Additional Assessment of Capital Stock." In the case of *Pithiam Land Company* v. *Johnston, Revenue Agent,* decided on April 2, 1917, without a written opinion, and reported in 74 So. page 694, the original record being No. 19018, is found an authority on all-fours with the one now under consideration by the court. The original record in that case shows that the back assessment was made on the assessment roll under heading of "additional assessments of capital stock."

We assert without fear of contradiction, that the Pithian case, which was affirmed by this court, cannot be distinguished from the case at bar. It is argued on page 6 of appellee's brief that the *prima-facie* correctness of the assessment roll does not arise until the roll has been approved by the board of supervisors. No authority is cited, nor do we think any such authority can be found. The assessor's entry is not a mere clerical entry, as stated by counsel for appellee. In the *Tonella case,* 70, Miss., the court said the assessor was a judge of value. The act of the assessor is an official act, and it is entitled to *prima-facie* presumption of correctness. 37 Cyc., 1069-1070-1071.

In the case at bar, the revenue agent took an appeal from the decision of the board of supervisors, and the trial was had *de novo,* just as though no judgment had been entered by the board of supervisors. The assess-

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ment roll, therefore must have been *prima-facie* correct, just as it came from the hands of the assessor.

In conclusion, we submit that under no circumstances should the court have granted a peremptory instruction to the defendant, but this case should be reversed and judgment entered here for the plaintiff, as appellant's request for peremptory instruction should have been granted.

Scott & Crisler, for appellees.

It is expressly admitted that this entire capital stock of appellee was, for all the years 1910 to 1915, inclusive, invested in real and personal property, located and situated in the first judicial district of Coahoma county, Mississippi, and all this real and personal property was assessed for taxation on the assessment rolls of Coahoma county for the years 1910 to 1915, inclusive, and that all taxes assessed against said property were duly paid.

Let it be specially borne in mind that appellee's entire capital stock was invested in the said property upon which all taxes were paid. Had the assessed value of this property exceeded the value of appellee's capital stock, appellee would surely have been liable for the full property tax just the same. If perchance, however, appellee in its business transactions had been so unfortunate as to put all its capital into property, the value of which is far below the amount invested, can appellee be chargeable with further tax than on the assessed value of such property? The manifest position of appellee, then, is that since this property represents it entire capital, any additional assessment on the capital stock would amount to double taxation.

We confidently maintain that when it is brought to the attention of the board that all of the capital is so invested it is the duty of the board to inquire into and

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see if such property is correctly assessed, and if it so find, the state is concluded thereby. This the board was bound to have done in approving the assessment rolls as provided by law. *State* v. *Simmons,* 70 Miss. 485.

This decision is entitled to the greatest consideration. Although at the time it was handed down, section 4267, Code 1906, sec, 6901, Hemingway's Code, had not been enacted, Judge Cooper in speaking for the court, had in mind, and outlined in this opinion, the method of taxation described in this section, and his announcement was later embodied in this statute. The decision on page 501 says: "That we may not be misunderstood, we will note here that we speak with reference to a subject of taxation omitted by the assessor, and not considered by the Board of supervisors. If the thing taxed, the real and personal property of the company—comprised its capital stock, the mere change of nomenclature would not carry liability to an additional tax nor open the door to a reconsideration of the value of the property. Values, when fixed by the conjoint action of the citizen and the constituted authorities, cannot again be made the subject of controversy between the state, and the citizen, but are definitely and conclusively fixed by the final action upon the assessment rolls according to law."

As already noted. this decision was the forerunner of section 4267, Code 1906, section 6901, Hemingway's Code, which provides the method of taxing the capital stock of a corporation. This proceeding was instituted at the instance of the revenue agent to assess for back taxes the capital stock of the appellee. Nowhere in the entire proceedings is there the slightest intimation that there is any intention to tax appellee's franchise. Nevertheless, appellant's entire brief is addressed to the proposition of taxing corporate franchises, Why is appellant attempting to swap horses in midstream? The franchise and the capital stock are

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entirely separate, having distinct taxable values, and cannot be confused or intercharged, *Adams* v. *Bullock,* 94 Miss. 27.

In view of this decision, which is the repeated announcement of this court, and particularly in face of section 4267, Code 1906, section 6901 Hemingway's Code, we fail utterly to comprehend the purport of, the lengthy discussion in brief of counsel for the appellant regarding taxation of corporate franchises, unless it be to lead the mind of the court away from the real purpose of this proceeding, namely, that of taxing further the capital stock of appellee. We are disposed to believe that appellant, seeing the storm approach, has trimmed his sails for new direction.

Let us review briefly the cases cited in the brief of counsel for appellant. The case of *Peoples Warehouse Company* v. *Yazoo City,* 97 Miss. 500, holds nothing adverse to the contention of the appellees. However, it is plainly evident that that case is distinguished from the case at bar in that the record does not show that the entire capital was invested in the property and because the market value of the capital stock and the value of the property are admitted. In the case at bar, the record shows that appellee's entire capital is invested in the property upon which all taxes were duly paid, and the record contains no evidence of market value of appellee's capital stock. The question before the court in the Warehouse Co. case was whether the corporation could be taxed for any amount over and above the property which it owned, whether in the form or franchise or corporate stock. If a corporation could be so taxed, it was no concern to the court or the parties whether such tax should be imposed upon the franchise or upon the capital stock.

The case of *Panola County* v. *Carrier,* 89 Miss. 277, merely cites with approval the decision of the court in the case of *State* v. *Simmons,* 70 Miss. 485, and

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announces that a corporation in giving its corporate stock for assessment of taxes is not authorized to deduct therefrom its indebtedness.

The case of *Adams* v. *Bullock, supra,* distinguishes between the taxable value of the corporate franchise and the taxable value of the corporate stock, defining them as separate and distinct. The case of *State* v. *Simmons, supra,* announces the rule for taxation of corporate stock, which later was enacted into law and became section. 4267, Code 1906, section 6901, Hemingway's Code.

There is nothing in these cases to justify a suspicion much less a conclusion, that appellee's franchise can be taxed in this proceeding which was instituted to further tax the capital stock, when the franchise and capital stock are entirely separate and distinct, and each has taxable value of its own. Especially is this true, when no attempt whatever has been made to assess appellee's franchise. Hence, we do not feel called upon to say whether the franchise of appellee is or is not liable for back taxes, but we say unhesitatingly that under the facts as shown, appellee is not liable for back taxes on its capital stock. And in conclusion of this point we again quote one of the sentences in the paragraph quoted from *State* v. *Simmons, supra;* "If the things taxed, the real and personal property of the company, comprised its capital stock, the mere change of nomenclature would not carry liability to an addition tax, nor open the door to a reconsideration of the value of the property.'

Assessment roll conclusive evidence of value. Section 4256, Code 1906, section 6887, Hemingway's Code, makes the assessment roll *prima-facie* evidence of value. We agree heartily with appellant that it is elementary that this evidence becomes conclusive in the absence of counter proof to overthrow the presumption thus made by the statute, but the question natu-

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rally arises, at what stage does this presumption of correctness attach to the assessment roll. Before answering, let us review briefly the steps necessary to complete the assessment roll. The law provides: (1) It shall be the duty of the assessor to make the assessment; (2) That notice shall be given of the filing of the roll with the board; (3) A time for hearing objections; (4) correction of errors by the board; (5) approval of the roll by the board. By what process of reasoning can it be said that the roll is *prima-facie* correct before approval when the law acknowledges the existence of errors by providing that the board shall correct them before approving the roll. In contemplation of the law, it does not become an assessment roll in any legal sense until approved by the board.

After such approval, if it should later be found that an error existed, due correction could be made under section 4312, Code 1906, section 6946, Hemingway's Code.

The mere statement in appellee's answer that its capital stock was worth "approximately ninety cents on the dollar and has not exceeded that amount in value during any of the years from 1910 to 1916, inclusive," is no admission of value and is utterly void of probative force. Certainly, if the value was approximate and did not exceed 90 cents for any of those years, the inevitable conclusion is that it must have been less and necessarily varied from year to year. What amount then, less than nintey cents, will be assessed as the value of the stock for 1910? What amount for 1911? What amount for each and every year from 1910 to 1915, inclusive? If we assume some arbitrary value less than ninety cents as the value during all these years, what amount shall it be? Certainly these considerations compel the conclusion that this statement is too indefinite to constitute an

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admission of value and amounts to no proof whatever. *Donald* v. *Petty,* 4 N. Y. 673.

This matter *res adjudicata.* Appellee pleads as *res adjudicata* an order of the board of supervisors passed at a meeting held in the second district of Coahoma county. Appellant objected to the introduction of this order in the court below on the ground that the board did not have jurisdiction over a matter pending in the first district at a meeting held in the second district.

When this order was offered as evidence, appellant objected and the court reserved its ruling. Appellant did not demand or even request a ruling from the court before the evidence was all in and both sides had rested, or at any other time. The case then proceeded to judgment as if no objection had been made. This action on the part of appellant constituted a waiver of the objection. Under these circumstances the result was inevitable that this *bona-fide* order of a recognized tribunal should receive full faith and credit, resulting in a judgment for appellee, even should appellee not have been entitled to it under any other view of the case. And we now submit that it is now too late to predicate error upon the admission of this order, and since this order constitutes a complete defense to appellant's claim, and no error, no matter how palpable, can avail appellant anything, the granting of a peremptory instruction requested by appellee was inevitable. But in case the court should decide to consider the question of the order we would call its attention to the following observations. Appellant cites in support of his objection, Laws 1892, page 362, manifestly referring to section 12 thereof. We maintain that section 12 is not applicable to the facts in this case in view of section 11 of said Act. Section 11 reads as follows: "The board of supervisors of said county shall hold their meetings or sessions at the times required and pro-

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vided by law, alternately, at Friars Point and Clarksdale, respectively, the seats of justice of the aforesaid first and second district holding their first meeting or session after the passage of this act at Friars Point, and their jurisdiction shall extend over the entire county just as if it were not divided into separate districts. The clerk of the chancery court of said county shall be the clerk of said board at each of said districts." This power is restricted only by section 12 which has reference to the approval of assessment rolls.

We therefore maintain, first, that appellant is concluded by the admission of the order of 1916; second, that should the court not so hold, and give consideration of this additional objection of appellant to the order, which would appear contrary to all recognized principles of procedure, the said objection is entirely void of merit; and third, that the board was vested with full jurisdiction under section 11, Laws of 1892, and appellee is now fortified behind the unscalable walls of *res adjudicata.*

STEVENS, J., delivered the opinion of the court.

This is a proceeding by the state revenue agent to back-assess the United States Nursery Company, a corporation, upon its capital stock for the years 1910 to 1915, inclusive. At the instance of the state revenue agent the tax collector of Coahoma county gave notice to appellee of an additional and back tax assessment on a valuation of twenty-five thousand dollars capital stock, surplus, and undivided profits for each of the years mentioned, The notice was duly served and upon objections by appellee and consideration thereof by the board of supervisors the assessment was disallowed. From the order of the board disallowing the assessment the revenue agent appealed to the

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circuit court. The issue was presented to the court and jury, a peremptory instruction was granted appellee, and from the judgment of the circuit court the state revenue agent prosecutes this appeal.

One defense presented by appellee is submitted in the following paragraph of its sworn answer:

"Your respondent's authorized capital stock is now and has always been under its charter of incorporation seventy-five thousand dollars, but that of said capital last aforesaid only sixty-four thousand eight hundred dollars has been issued, sold, and paid for; that all of its said paid-in capital stock, last aforesaid, is now and has been, during all the years last aforesaid, invested in real estate and personal property, situated in Coahoma county, state of Mississippi, and that the said capital stock so issued and paid in, as above stated, has now a cash market value of something less than par, to wit, approximately ninety cents on the dollar, and has not exceeded that amount in value during any of the years from 1910 to 1916, inclusive; that your respondent has during all the years last aforesaid paid all taxes levied and assessed against its said real and personal property, and that its real and personal property has been during all the years last aforesaid and is now assessed for taxation, and taxes paid there on, as other like property is assessed and taxed in Coahoma county, Miss."

Appellee further pleaded that J. C. Johnston, former state revenue agent, had heretofore attempted to back-assess appellee upon its capital stock for the same years involved in this proceeding, and that at a regular meeting of the board of supervisors of Coahoma county held at Clarksdale in April, 1916, an order was passed by the board disapproving the back assessment, and that no appeal had been prosecuted from this prior order and that the same is now *res adjudicata.*

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The appellee is a corporation domiciled in the first district of Coahoma county engaged in the business of operating a plantation and nursery.

In the circuit court the revenue agent introduced Mr. Crowell, the manager of appellee company, who testified as to the capital stock paid in, the property owned by the company, and something of the business which the company was doing. This was the only witness introduced. Appellee introduced the order of the board of supervisors of Coahoma county entered at Clarksdale in April, 1916 in the second judical district of said county, disapproving the assessment made at the instance of J. C. Johnston, former state revenue agent. This constituted all of the evidence submitted to the jury. Both sides asked for a peremptory instruction and the trial judge charged the jury to find for the defendant. The correctness of this ruling is challenged by the present appeal. Appellee relies for affirmance on three grounds: First, that all of the capital stock of the United States Nursery Company was invested in real and personal property; that this tangible real and personal property had been duly assessed for taxes on the assessment rolls of Coahoma county and taxes duly paid thereon, leaving no part of the capital stock untaxed; second, that inasmuch as all the capital stock had been invested in real and personal property which had been duly assessed and taxes paid thereon, the value of this assessment of real and personal property must be taken and considered as the full value of the capital stock, there being no proof in the record as to actual market value; third, that the matter at issue has been heretofore adjudged by the board of supervisors at the instance of the former revenue agent.

The testimony of Mr. Crowell tends to prove that the corporation of which he is the active general manager was organized in December, 1904; that it is a land-holding and farming corporation domiciled at Rose

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Acre, in the first district of Coahoma county; that no return has ever been made to the assessor, and no taxes paid, on the capital stock of the company, but that the real and personal property of the company had been assessed upon the rolls like the property of individuals; that the company owned one thousand, and twenty-four and a fraction acres of land, "above seven hundred acres" of which was in cultivation during each of the years in question, the rest being woodland; that about one hundred and twenty-five acres was planted in nursery stock; that the personal property consisted of mules and farming implements; and that the land which was not planted in nursery stock was utilized in general farming and in producing cotton and corn. Witness further testified that the authorized capital is seventy-five thousand, dollars, of which sixty-four thousand, eight hundred, dollars was paid in, represented by six hundred, and forty-eight, shares of the par value of one hundred dollars each; that there was no bonded indebtedness, but that the company owed twenty-five thousand, dollars, represented by notes executed for the purpose of paying off the mortage indebtedness when the plantation was purchased and in making the crops; that the stock was carried on the books at ninety cents on the dollar ever since the organization, but that no dividends had been paid and that the stock was carried at ninety cents just as "a matter or form;" that the company had been unfortunate in its nursery stock, and had had labor and weather conditions to contend with, and on this account the company had not paid dividends.

The following questions with the answers thereto are quite pertinent to the present inquiry:

"Q. What, if any, money did you make during the years 1910 to 1915? A. Well, possibly a little, just about holding our own. Almost an even break each year as I recall it. Q. As to the cash market value

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during the years 1910 to 1915, did it have any cash market value? A. I should not think so. None that I know of. Q. Did it have any cash salable value at that time? A. Why none that I know of."

Witness was further asked if the business was in better financial condition in 1915 than it was in 1910, and in response thereto said that it was worth possibly one thousand dollars to two thousand dollars more.

The assessment rolls were introduced and witness also testified as to the assessed value of both real and personal property for each of the years for which back assessment is sought. The combined assessed value of both real and personal property varied somewhat each year, ranging from nine thousand seven hundred and ten for the year 1910 to twelve thousand one hundred and seventy-four dollars for the year 1915.

There is no merit in the contention that merely because all of the capital stock of appellee corporation had been invested in real and personal property, and that its real and personal property had been assessed and subjected to taxation, the corporation cannot now be back-taxed upon any portion of its capital stock. The record shows that the corporation has neither been assessed upon capital stock *eo nomine,* nor paid taxes upon the value of its capital stock as such. There has been no return for assessment nor any assessment whatever of capital stock. The argument of learned counsel on this, the first point relied upon for affirmance, was clearly answered by Judge Anderson, speaking for this court in *People's Warehouse Co. v. Yazoo City,* 97 Miss., 500 52 So. 481, and especially by the observations of the supreme court of Massachusetts in *Commonwealth* v. *Cary Improvement Co.,* 98 Mass. 19, and likewise by the observations of the supreme court of the United States in *Adams Express Co.* v. *Ohio,* 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, quoted with approval in the *Warehouse Co Case.*

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The plan of assessment prescribed by section 4267, Code or 1906 (section 6901, Hemingway's Code), has not been followed or complied with by appellee.

As said by our court in *State* v. *Simmons*, 70 Miss. 485, at page 503, 12 So. 477, at page 480, of the opinion: "The words of our statute, capital stock at its market value, include not only the franchise of the corporation, but also its property of all description."

But, as further stated, in a proceeding of this kind to back-assess the capital stock for taxation: "The assessment heretofore made of the real and personal property of the company should be deducted from the value of the stock, for, as we have said, they constitute factors in determining its value; and, having been once assessed, taxation of it again, under the name of the stock, would be double taxation."

It is quite true, therefore, that the total assessed value of the real and personal property should be deducted from the value of the stock in the present inquiry. This brings us to the second point relied upon by the appellee for an affirmance, to wit, that the actual market value of the stock was not shown, and therefore the state revenue agent as the plaintiff in the proceeding could recover nothing.

Much is said in the briefs about the sworn admission of appellee in its answer that the paid-in capital stock "has now a cash market value of something less than par, to wit, approximately ninety cents on the dollar, and has not exceeded that amount in any of the years during 1910 to 1916, inclusive;" appellant contending that this is an admission that the capital stock is worth at least ninety cents on the dollar, while appellee contends that "approximately ninety cents" does not necessarily mean the full amount of ninety cents, and still leaves no fixed basis upon which a verdict could be returned. Appellee further contends that it ought not to be bound by this admission in the

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answer for the further reason that the manager testified that the stock was carried on the books at ninety cents as a matter of convenience and form, and that the statement in the pleadings should now yield to the proof. Appellee further contends that the proof failed to fix any valuation upon the capital stock, and on that account the defendant was entitled to the peremptory instruction which was asked for and given. The propriety of this ruling by the trial judge rests, we think, upon the proper consideration of the burden of proof in this case.

Upon whom was cast the duty of showing and fixing the value of the capital stock in this proceeding? The record affirmatively shows that acting upon the request of the state revenue agent the official tax assessor of Coahoma county back-assessed appellee on its capital stock at a valuation of seventy-five thousand dollars for each of the years 1910 to 1915, inclusive. The action here may be said to be the joint action of the state revenue agent and the official tax assessor. As stated by Chief Justice Cooper in *State* v. *Kuhn,* 72 Miss. 276, 16 So. 598:

"In the execution of the legislative scheme the revenue agent is the directing, impelling agency provided for to put in action the officers and machinery contemplated by the Constitution. He is the state's agent to compel action by other officers, in order that the constitutional scheme by which all property was intended to bear its equal portion of taxation shall be effectuated. To accomplish this purpose, it is as necessary that the machinery once set in motion shall be kept going until the end is reached as it is that motion shall be inaugurated."

Both the state revenue agent and the tax assessor are public officers, and the general legal presumption that they have regularly and accurately performed

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their duties must ordinarily be indulged. As stated by Judge Cooley:

"The general presumption that public officers have regularly performed their duties applies to official acts in tax matters." 1 Cooley on Taxation (3 Ed.), p. 447.

It is said in Amer. & Eng. Enc. Law (2 Ed.), p. 697:

"In the absence of evidence to the contrary it will be presumed that the assessing officers performed their official duty, and authenticated the assessment in the manner and form directed by the statute."

In 12 Ency. of Evidence, p. 370, it is said: "The proceedings of public officers in the levy, assessment, and collection of taxes are presumed to be regular and legal."

And on page 296 of the same volume: "Where a tax assessor in the line of his official duty makes an assessment of property for escaped taxes, the presumption is in favor of the assessment list and the return thereof."

Mr. Judson observes: "The burden of proof, which devolves upon the actor in all litigation, is emphasized in tax litigation, that is, in litigation involving the legality of taxation in that the litigant must overcome the presumption that assumes the validity of the exercise of legislative power, and the further presumption, when the acts of taxing officers are complained of, that such officers do not violate their sworn duty." Judson on Taxation (2 Ed.), par. 645.

It is true that this statement of Mr. Judson is primarily directed to those cases in which the litigant sues to recover back an alleged illegal tax, but the point is emphasized that the presumption is in favor of the acts of taxing officers.

In the case of *New Orleans Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97, 25 L. Ed. 409, the Supreme Court of the United States observed: "In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The decision of the assessor

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must stand, unless it can be affirmatively controverted."

In *People ex rel.* v. *Keener,* 194 Ill. 16, 61 N. E. 1069, it was stated: "That proof made a complete *prima-facie* case. The collector's return of the delinquent list, with statutory notice and proof of publication, *prima-facie* entitles the collector to judgment for the tax returned as delinquent. The presumption is that the assessor and other officers charged with levy and collection of taxes have done their duty, and have not made an illegal assessment or returned an illegal tax delinquent. We have repeatedly held that the burden of proof showing such matters as would avoid the tax or establish its illegality is upon the person objecting thereto.' *Consolidated Coal Co.* v. *Baker,* 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; *People ex rel.* v. *Chicago & Alton Railroad Co.,* 140 Ill. 210, 29 N. E. 730; *Chicago & Northwestern Railroad Co.* v. *People,* 171 Ill. 249, 49 N. E. 542. 'It is the settled doctrine of this court that any one objecting to the enforcement of a tax assumes the burden of showing its invalidity. The presumption is that the tax is just—that all officers who have had any official connection with it have properly discharged their duties.' *Peoria, Decatur & Evansville Railway Co.* v. *People ex rel.,* 116 Ill. 401, 6 N. E. 497."

This quotation was expressly approved in the later case of *People* v. *Hulin,* 237 Ill. 122, 86 N. E. 666.

The supreme court of Florida in the very recent case of *Camp Phosphate Co.* v. *Allen,* 81 So. 503, employs this language: "The good faith of such officers and the validity of their actions are presumed. When assailed, the burden of proof is upon the complaining party" (citing authorities).

The fact that the board of supervisors disapproved the assessment does not prevent the application of the rule under discussion. As said by Judge Cooper in *State* v. *Kuhn, supra*: "It is as necessary that the

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machinery once set in motion shall be kept going until the end is reached as it is that motion shall be inaugurated," and to the revenue agent "the right of appeal was given" by statute.

In this case the revenue agent appealed from the order and in the circuit court the trial was *de novo*. It was further stated in the *Simmons Case, supra*: "It is to be noted that assessments of the character now under consideration are made *nunc pro tunc*."

The rule of evidence was expressly applied in a back-tax proceeding in *State* v. *Kidd*, 125 Ala. 413, 28 So. 481, in which the court said:

"Tax assessments made in the line of official duty are entitled to the usual presumption of correctness which attends the acts of public officers. *Perry Co.* v. *Selma, M. & M. Co.*, 65 Ala. 391; 25 Am. & Eng. Enc. Law, 236; 2 Desty, Tax'n, pp. 615, 616. The duty of assessing for escaped taxes, and of making a list and return thereof, is by the statute imperatively enjoined upon the assessor, and such list and return are of equal dignity as evidence with lists made for the current year. The evidence introduced upon the trial tended to show a valid assessment of property in both these cases, and in each of them the circuit court erred in giving the general affirmative charge for the defendant."

It will be observed that section 4740, Code of 1906 (section 7058, Hemingway's Code), in prescribing duties of the revenue agent in making additional assessments, requires ten days' notice in writing to the person or corporation whose property is assessed and expressly says: "All objections to such assessment shall be heard at the next meeting of the board," etc.

In the light of the authorities mentioned we are led to the conclusion that upon the trial of this case in the circuit court the duty devolved upon the corporation not only to disclose but to fix with some degree of

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certainty the value of its stock, and that the lack of proof on this point militates against the corporation and it failed to overcome the *prima-facie* showing made by the taxing officers. If in fact the capital stock had no value in excess of the aggregate assessed value of its real and personal property, then certainly the officers and manager of the corporation could so testify and prove with some degree of certainty. This is a matter peculiarly within the knowledge of appellee. Indeed our statute (section 4267, Code of 1906 [section 6901, Hemingway's Code]) requires the president or other officer of the corporation to furnish, on demand, this information under oath in making original returns for assessment to the official tax assessor. On the point, therefore, as to want of proof of market value it was error to grant appellee a peremptory charge. It affirmatively appears that the capital stock had some value. Mr. Crowell admitted that the company had made a little money; that the stock was carried on the books at ninety cents on the dollar; that for two years preceding the trial of this case the company had paid an income tax to the federal government; that the company was in better financial condition in 1915 than it was in 1910. As stated by the supreme court of the United States in *Adams Express Co.* v. *Ohio, supra*: "It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation."

There is no merit we think in the plea of *res adjudicata*. By an act of the legislature approved February 19, 1892, Coahoma county was divided into two districts; the courthouse of the First district being fixed at Friar's Point, and for the Second district at Clarksdale. Section 12 of the act, among other things, provides:

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"It shall be the duty of the assessor of Coahoma county to file with the clerk of the chancery court of said county, two copies each of the land and personal assessment rolls of said county, filing one of each with said clerk at his office at Friar's Point and one of each in his office at Clarksdale, and said board of supervisors in passing on said assessment rolls, shall at the proper meeting, held by them at Friar's Point, approve so much of the same as shall relate to and embrace property included and being in the first district of the county, and at the proper meeting held in Clarksdale, they shall act on and approve so much of said roll, as shall embrace and include the property within the Second district of said county, in all instances acting upon said rolls so far as the territory embraced in each of the respective districts is concerned in the same manner as though the action on or approval thereof related to the approval of assessment rolls of different counties, and the assessor and clerk shall provide suitable copies of said entire rolls as finally approved in all instances where required by law as though said rolls related to different counties; provided, that only one copy of each shall be required to be filed with the auditor of public accounts when the rolls shall have been approved for and so far as the same shall relate to each of said districts." Laws 1892, p. 368.

This very section of the act was construed by this court in *Investment Co.* v. *Suddoth,* 70 Miss., 416, 12 So. 246, and that case rules the point under discussion. In the course of the opinion in the Suddoth Case Judge Cooper said: "It is too clear for contention that the action of the board at its meeting at Friar's Point was a nullity in so far as it related to the assessment of the lands situated in the Second district."

So in the case at bar, the action of the board of supervisors taken at Clarksdale disapproving the as-

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sessment of J. C. Johnston, state revenue agent, was in violation of the statute and a nullity.

On neither of the points relied upon by appellee can the peremptory instruction in this case be justified. The judgment of the learned circuit court will accordingly be reversed, and the case remanded for a new trial.

Reversed and remanded.

SMITH v. STATE.

[83 South. 337, In Banc. No. 28031.]

ANIMALS. *Defective indictment charging alteration of brand.*

An indictment under Code 1906, section 1054 (Hemingway's Code, section 782), charging the alteration or defacement of the mark or brand of an animal, is fatally defective where it does not charge that the mark or brand alterated by the defendant was intended to designate ownership of the animal.

APPEAL from the Circuit Court of Perry County.

HON. R. S. HALL, Judge.

John C. Smith was convicted of knowingly altering and defacing the brand or mark of an animal and appeals.

Section 1054, Code of 1906 (section 782, Hemingway's Code), referred to in the opinion, is as follows: "If any person shall knowingly alter or deface the brand or mark of any animal, intended to designate ownership, the property of another, without his consent, and with intent to deprive the owner of his property, he shall, on conviction, suffer the same penalty mentioned in the last section."

The indictment referred to in the opinion is in the following words:

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"The grand jurors for the state of Mississippi, elected, impaneled, sworn, and charged, in and for Perry county, state aforesaid, in the name and by the authority of the said state of Mississippi, upon their oath, present that John C. Smith, on the 9th day of October, 1917, in Perry county aforesaid, two hogs, of the value of six dollars, and of the property of Luther Fillingame, then and there being found, did unlawfully and feloniously take, steal, and carry away, against the peace and dignity of the state of Mississippi.

Currie & Currie, for appellant.

We submit that the action of the lower court in overruling the demurrer and putting the appellant to trial under this pretended indictment was a denial to the appellant of his constitutional rights under articles five and six in amendments to the constitution of the United States. We do not copy herein the full text of these two articles of the constitution but refer the court to them, and from article five quote the following: "Nor be deprived of life, liberty or property, without due process of law."

In this case the very foundation and beginning, the very center of due process of law was and is an indictment charging the defendant with the offense created by the statute. This cannot be successfully disputed.

From article six we quote the following: "And to be informed of the nature and cause of the accusation." The indictment in this case, it is clear, did not inform the appellant of the nature and cause of the accusation, on the contrary it has already been pointed out the indictment omitted and did not charge the very essence of the offense to wit; that the mark or brand which it is alleged the appellant altered was a mark or brand intended to designate ownership.

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Reading these two constitutional provisions in connection with the indictment and section 1054 under which the indictment was drawn it is rendered self evident that the appellant was deprived of his liberty without due process of law, and this being true the duty of the court not only to reverse but to dismiss the case is apparent. The demurrer in this case was timely filed, was argued in the court below in due course in the trial of the case and should have been sustained but was erroneously overruled.

Another reason why it became the duty of the court not only to reverse but to dismiss the case is because the indictment can never be amended. A new indictment is and would be necessary to put the appellant to trial. The material element of the offense defined in said section 1954 is not alleged in the indictment as has already been pointed out.

In the case of *Kline* v. *State,* 44 Miss. 317, it was held by this court that if a material element of the crime or a necessary negative be omitted, the indictment cannot, by authority of the statute (section 1508, Code 1906), be amended so as to cure the defect.

In the case of *Kline* v. *State,* it is said the indictment omitted to negative the exception by inserting the words "not being a druggist or an apothecary" as contained in the enacting clause of the statute. This negation being material, the statute does not authorize the court at a subsequent term to allow an amendment by inserting the words of the exception.

In the case of *Sherman Blumenberg* v. *State,* 55 Miss. 528, the court held that indentity of name is not essential, and amendment can be made therein; but identity of the offense and of the person is essential, and cannot be amended.

In the case at bar the words of the statute "intended to designate ownership" not only identify the offense but constitute and are an essential element of the

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offense. We therefore submit that there could be no amendment of the indictment in this case.

But suppose it is argued by the state that the indictment can be amended, we make this reply: 1. The state waived its right to amend the indictment before putting the appellant to trial thereunder in the lower court after the demurrer was filed pointing out this fundamental and fatal defect in the indictment. 2. The state proceeded without amending the indictment or asking leave of the court so to do, to put the appellant to trial on the merits under this indictment not charging one of the essential and indispensible elements of the offense, and thereby stated its case.

We submit that any amendment which is necessary and which can by law be made ought to be made timely, and especially in a criminal prosecution for such a prosecution touches and affects not only the property but the life and liberty of the accused. And especially in a case like this where the fatal defect in the indictment is pointed out and argued, to the court in a demurrer and under a plain, simple, unambiguous statute such as section 1054, Code of Mississippi, 1906, under which the indictment challenged was drawn. But we reassert that by law there can be no amendment of the indictment in this case.

Section 1508 of Code of Mississippi 1906, does not authorize the amendment of an indictment so as to change an essential element of the offense which has been omitted.

The court will bear in mind that the offense with which the appellant was intended to be charged is a statutory offense. The statute therefore, alone must be looked to for its own definition of the offense created by it. The essential elements of a statutory offense are to be found in the statute creating it. All criminal statutes are strictly construed, and an indictment drawn under a criminal statute seeking to

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punish an alleged offense created under a statute must follow strictly the language or plead it substantially. This is as broad a statement of the law as the state is entitled to and goes as far as the court can possibly go in considering the question of the sufficiency of the indictment in this case. The court will look in vain for any allegation or pretended allegation in the indictment in this case which alleges or pretends to allege that the mark or brand upon the animal which it is alleged the appellant altered was a mark or brand put upon the animal "intended to designate ownership," and it is useless to add that these essential words or this essential allegation in the indictment cannot be supplied by construction, interpolation or implication. It stands outside of the indictment. It can never, by any law in this state, be gotten into by amendment or otherwise, and we submit that the omission being fatal and fundamental, it is the right of the appellant under the law to seek both and to obtain both the reversal and dismissal of the case.

Walter Dent, Assistant Attorney-General, for the state.

The appellant demurred to this indictment on the ground and for the reason that the indictment does not charge that the alleged alteration of said mark of said sheep was an alteration of a mark intended to designate ownership. This demurrer was by the court overruled. The action of the court in overruling this demurrer is assigned as error. The indictment, we submit, would have been in better form if it had charged, to wit: "That Trav and Hub Cooley, on the third day of February, 1919, and for a long time prior thereto were the owners of a certain animal, to wit: a sheep and that they, the said Trav and Hub Cooley, did mark said sheep in its ears, intending thereby to

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designate by reason of said mark aforesaid that they, the said Trav and Hub Cooley, were then and there the owners of said sheep so marked aforesaid; that after said sheep had been so marked as aforesaid by the owners thereof as aforesaid, for the purpose aforesaid by John C. Smith, knowingly and feloniously, on or about the third day of February, 1919, without the consent of the said owners of said sheep aforesaid and with felonious intent then and there to deprive the said owners of said sheep, did alter the said mark in the ears of said sheep then and there owned and marked aforesaid by the owners aforesaid, for the purposes aforesaid, against the peace and dignity, etc."

The indictment in the case at bar is not as full as we think it ought to be, but after a careful reading of the statute under which it was drawn, together with the indictment we are inclined to believe that it substantially charges the offense as defined by the statute.

The indictment in part says: "John Smith . . . altered the mark . . . intended thereby to designate ownership of the said property, not that of the owners. We submit that the clause "not that of the owners" in the indictment cures the error complained of and that the court committed no error in overruling the demurrer.

We submit that the court committed no error in giving instruction No. 1, for the state, if the court was correct in overruling the demurrer to the indictment. Instruction No. 2 is the law of the land given by the court for the state.

After carefully reading the record as a whole, we do not see how the jury could have reached any other conclusion except than that it did reach, to wit, in bringing in a verdict of guilty.

We submit that the case should be affirmed.

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SMITH, C. J., delivered the opinion of the court.

The appellant was convicted for a violation of section 1054, Code of 1906 (section 782, Hemingway's Code); but the indictment on which he was tried is fatally defective, for the reason that it fails to charge that the mark altered by him was "intended to designate ownership." Consequently the demurrer thereto should have been sustained.

Reversed and remanded.

HOUSE v. STATE.

[83 South. 337, In Banc. No. 20931.]

BURGLARY. *Instructed acquittal proper where proof failed to show ownership as alleged.*

In a prosecution for burglary where the indictment laid the ownership of the burglarized building in a railroad company, a corporation, but the evidence failed to show that such railroad company was either a *de jure* or *de facto* corporation, the court should have given a peremptory instruction for the acquittal of the defendant.

APPEAL from the circuit court of Jones county.

HON. R. S. HULL, Judge.

Frank House was convicted of burglary and appeals. The facts are fully stated in the opinion of the court.

J. M. Arnold, for appellant.

The first instruction authorizes a conviction if the property is believed to be property of the Southern Railroad Company when the indictment alleges it was the property of the Southern Railroad Company a corporation. In other words this instruction amounts to the court telling the jury it is only necessary for the

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State to prove a part and not the whole of the allegations of the indictment. Then again the instruction tells the jury that in this case it is immaterial as to whom the property belonged, that is, the depot, if the jury believe the property was stolen. Now even this might possibly be true if the instruction had gone further and said "in the trial of larceny" but the in-instruction details a state of facts that at most would only make larceny and yet in a burglary case tells the jury that if the jury believe that state of facts it is immaterial on the trial of a charge of burglary. A simple reading of the instruction will show conclusively that the distinction was not drawn between larceny and burglary and the instruction was misleading to the jury. Now the appellant contends, and the record bears out this contention, that there was no testimony showing the Southern Railroad Company was or is a corporation as alleged in the indictment. This question was raised in the lower court by the appellant asking instruction No. 1 which was refused and was met by the State in asking instruction No. 1, which was given. In other words the court instructed the jury that the State did not have to prove that this was a corporation. This is no longer an open question in this State. This court in the case of James v. State, 77 M. 370-26 So. 929-78 Am. St. Rep. 527 has once for all settled this question and Judge Whitfield in the opinion in this case says "it is certainly settled that it is necessary to allege the ownership of the building burglarized and to prove it as laid. And where a corporation is alleged to be the owner, there must be proof of the existence of the corporation. Citing 2 Bishop, on Crim, Procedure, Sec. 138. . . . But there is absolutely no testimony whatever in this record as to the existence of the corporation and this failure of proof would be fatal error had it been availed of specifically in the court below." The court

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refused to reverse the James Case because of failure to raise the point in the court below, but in the case at bar the appellant raised the point and instead of the state meeting it by supplying the missing testimony, if such proof existed, told the jury by an instruction practically that it was not material. Then if this was a necessary thing to be proved, if the appellant raised a reasonable doubt on the question of ownership of the depot, he was entitled to acquittal on this alone and this is what instruction No. 2 asked by the appellant and refused by the court, told the jury. The appellant was entitled to have this submitted, to the jury and the rule is too familiar in criminal cases to need any citation of law to show that the appellant was injured by the refusal of this instruction and for the giving of instructions Nos. 1 and 2 for the State and the refusal of instructions Nos. 1 and 2 asked by him the case should be reversed.

R. M. Bordeaux, assistant attorney general, for state.

We come now to the discussion of the proof of the ownership of the building alleged to have been burglarized. It is true that the indictment in this case charges that the building was the property of the Southern Railway Company, a corporation. The testimony shows that the Southern Railway Company was using and occupying this depot. Under the authority of Brown v. The State, 33 So. 170, it certainly was not necessary to prove that the Southern Railway Company had a deed from the N. O. & N. E. Railroad Company conveying this depot and warehouse. It is sufficient to allege ownership in the lessee, occupant or user of a building alleged to have been burglarized, although the legal title may be in some other or numerous others, for that matter.

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We think of but two good reasons in alleging and proving the ownership of a building alleged to have been burglarized, and the first is to show that the building was not the building of the defendant, and, second, to so identify the property that the defendant would not be subject to another prosecution.

In this case there is no doubt about the identity of the building alleged to have been burglarized. It was the depot of the Southern Railway Company in the Town of Ellisville. This depot was used, occupied and operated by the Southern Railway Company and the question presented to this court on this appeal is this:

Will this court extend and apply the case of James v. The State, 26 So. 929, to the facts of this case and order a new trial of this appellant because of the failure of the state in the court below to offer any direct testimony that the Southern Railroad company was a corporation?

SMITH, C. J., delivered the opinion of the court.

The appellant was convicted of burglary, and the indictment on which he was tried lays the ownership of the building burglarized in the "Southern Railroad Company, a corporation," but the evidence fails to disclose that the Southern Railroad Company is either a *de jure* or *de facto* corporation; consequently the appellant's refused instruction No. 1 should have been granted. *James* v. *State,* 77 Miss. 370, 26 South. 929, 78 Am. St. Rep. 527.

Reversed and remanded.

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COLLATA *v.* WESTERN UNION TELEGRAPH CO.

[83 South. 401, In Banc. No. 20916.]

TELEGRAPH AND TELEPHONE. *Reasonable regulations and rules.*

The rule adopted by telegraph companies, that if a telegram is sent to its office by one of the company's messengers, such messenger acts as agent of the sender only, is a reasonable regulation and in such case the telegraph company is not liable if the message was never brought to its office by the messenger.

APPEAL from the circuit court of Sunflower county. HON. H. H. ELMORE, Judge.

Suit by D. Collatta against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Frank E. Everett attorney for appellant.

Special Plea Number 3 is as follows:

For further plea is this behalf, defendant says *actio non* because is says:

That it was one of the terms and stipulations printed on the telegraph blank on which the telegram involved in this suit and claimed to have been delivered to the company was written, among other stipulation, the following:

'No responsibility attaches to this company concerning telegrams until the same are accepted at its transmitting office and if a telegram is sent to such offices by one of the company's messengers, he acts for that purpose as agent of the sender.'

The defendant avers that the alleged message was sent by the sender by a messenger and not sent by

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the defendant for the same was never delivered to it at any of its transmitting offices; that it never received the same, and never undertook to transmit it.

And therefore, the defendant is not liable to the plaintiff for the damages claimed in said declaration or in any sum whatsoever and this the defendant is ready to verify."

The demurrer to this plea is as follows:

"Comes the plaintiff and demurs to the 3rd special plea filed by the defendant in this cause and prays the judgment of the court if he shall further answer make thereto and for cause of demurrer he assigns the following:

FIRST: The stipulations set up in said plea are against public policy and void, the defendant not being permitted by law to contract against its own negligence.

SECOND: Said plea admits the delivery of the message sued for to a messenger, and, delivery to a messenger of defendant being a delivery to the defendant itself, it cannot set up its own negligence as a defense to this action.

THIRD: Said plea presents no legal defense to the cause of action.

FOURTH: Said plea admits that the defendant company maintains messengers for the purpose of serving the public, therefore it cannot set up as a defense, the negligent act of its servants in the performance or non-performance of the duties for which such servant is employed and maintained by the defendant company.

FIFTH: Said plea presents no defense to the cause of action." "The above and foregoing Demurrer to Special Plea No. 3 is marked, 'filed March 18, 1919, J. R. Key, Circuit Clerk.'"

I respectfully submit that the lower court should have sustained the demurrer to this plea. The plea sets up the fact, that on the back of the telegraph blanks which are furnished by the defendant company

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is a clause that no responsibility attaches to this company concerning telegrams until the same are accepted at its transmitting office, and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

In Telegraph Company v. Craig & Company, 106 Miss. at page 289 of the opinion, this court, speaking through Judge Cook, discusses, to some extent, this question. The Telegraph Company filed the same plea as was filed by the defendant in the case at Bar setting up the printed terms and conditions upon the back of the blank used, pleading the fact that the messenger was the agent of the sender until the telegram had beeu delivered and accepted at the office of the defendant.

After discussing the question, Judge Cook concludes, his remarks, at the bottom of page 289, as follows:

"Conceding that the printed matter binds persons using the blanks, we can find nothing in the condition, relied on by appellant, to support its contention." It would seem from this decision that the Telegraph Company cannot make its agents the agent of the sender of the message.

In Western Union Telegraph Company v. Cobler, 62 So. Rep. Page 821, the court held that "A messenger of a Telegraph Company delivering a message is the agent of the company and not the agent of the sendee."

In Y. & M. V. Railroad Company v. Mattingly, 37 So. Rep. 709, and which is a Mississippi decision, the court held that "every carrier chooses its own servants and employs and changes and discharges them at pleasure. They are controlled solely by its own rules and judgment of its superior officers."

Then under these decisions, how can it be seriously contended by the Telegraph Company that the messenger, who received the message from S. Zemurray, was the agent of S. Zemurray in the delivery of the telegram to the company when this messenger is admitted-

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ly the messenger of the Telegraph Company.

As to the other three pleas filed by the defendant, I only refer the court to the case of Dickerson v. Western Union Telegraph Company, 114 Miss., at page 128, where it is held that the act of Congress of June 18th, 1910, which are the matters set up in these pleas, is not applicable in this case.

I therefore, submit that the judgment of the lower court in overruling demurrer to special Plea number 3 should be reversed and the demurrer sustained, and in that event then this court should in compliance with the agreement between counsel, shown at page 24 of the record, enter judgment final for the plaintiff in the sum of $756.59.

J. B. Harris, for appellee.

This case is completely covered by the recent decision of the Supreme Court of the United States reversing the judgment of this court, and overruling the Dickerson case in the case of the Postal Telegraph *Company* v. *The Warren-Godwin Lumber Company.*

D. Collotta sued the Telegraph Company to recover damages for the alleged failure to transmit and deliver a certain cipher message alleged to have been sent by S. Zummary & Company wholesale banana dealers in New Orleans, notifying him of the shipment of two car loads of bananas. The complaint was that on account of the failure to receive the telegram he did not get prompt notice of the arrival of the bananas at destination, and when he did get the notice of their arrival the bananas had spoiled on account of the delay. Collotta was a retail dealer in bananas and alleged it was his custom to meet the cars at destination and peddle out the bananas.

The Telegraph company filed a general issue plea and four special pleas. The first, second and fourth special

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pleas alleged that the message in question was an interstate message, being sent from a point in the State of Louisiana to a point in the state of Mississippi, and as such was interstate commerce, and that by the Act of Congress of 1910, the Congress of the United States had occupied the whole field of interstate communication by telegram, and had assumed charge of regulating the field of interstate commerce by telegram, and thereby removed and exempted such interstate commerce by telegram from the field of state regulation or interference, and undertook to, and did confer upon the interstate commerce commission full power over the rates, charges, facilities, classifications, and practices of telegraph companies engaged in interstate commerce in reference to such commerce, and had conferred upon the interstate commerce commission power to approve, alter or acquiesce in existing rates and classifications, which power the interstate commerce commission has ever since retained, and still retains, and that the said interstate commerce commission, prior to the filing of the message in suit, and prior to the commencement of the suit had full knowledge of the rates, charges, classifications, regulations and stipulations, including the one set up in the plea, and with such knowledge had acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, regulations or classifications. The first special plea sets up the unrepeated message stipulation. The second special plea sets up the valued message stipulation and the fourth special plea sets up the following stipulation; "No responsibility attaches to this company concerning telegrams until same are accepted at one of its transmitting offices, and if the telegram is sent to such office by one of the companys messengers, he acts for that purpose as agent for the sender. The stipulation last set forth is also set out in the third special plea as being a

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reasonable stipulation independent of the act of congress.

All of the special pleas were demurred to, the demurrer was sustained to the first and second special pleas under the authority of the Dickerson case. The demurrer was overruled to the third and fourth special pleas, the court holding that independent of the Act of Congress the stipulations set up in these pleas were reasonable regulations under the authority of Jones on Telegraph and Telephone Companies, par. 272 and cases cited, and 37 Cyc., Page 1692, and cases cited, there being no authority to the contrary. The court assigns as error the overruling of the demurrer as to the third and forth pleas, and the Telegraph Company had filed a cross assignment of error as to the court sustaining the demurrer to the first and second special pleas. In no view of the case, however, can there be a recovery by the plaintiff. If the messenger was not an agent of the company the plaintiff could not recover manifestly but by force of the decision of the supreme court of the United States in the case of the *Postal Telegraph Company* v. *The Warren Godwin Lumber Company,* the stipulation is binding, as the plea alleges, and it is admitted of course by the demurrer, that the message was delivered to a messenger not sent by the company for the same, and the message had never been presented to or accepted by the company at one of its receiving offices.

We do not deem it necessary to discuss the question further as the whole matter is closed out, we take it, by the decision of the supreme court of the United States in the case last cited.

We respectfully submit that the judgment of the court below should be affirmed.

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STEVENS, J., delivered the opinion of the court.

Appellant, as plaintiff in the circuit court, sued to recover damages alleged to have been sustained by reason of the failure of the Western Union Telegraph Company to transmit and deliver a telegram addressed to him at Indianola, Miss. Appellant was engaged in the business of handling fruits, including bananas, in carload lots. In May, 1918, plaintiff ordered from one S. Zemurray, of New Orleans, La., two cars of bananas, one car to be shipped to Yazoo City, the other to West Point. The shipper undertook to wire appellant by way of the Western Union Telegraph Company and claims to have written out and delivered to the company the following telegram:

"May 18, 5:35 p. m. D. Collotta, Indianola, Miss. Shocking Yazoo City IOFBB West Point LUOIF both inflame. [Signed] S. Zemurray. Paid rush rush rush."

This telegram was never delivered, and as a result of the failure to receive the telegram appellant claims that the bananas rotted, and that he was damaged in the sum of seven hundred fifty-six dollars, fifty-nine cents. The defendant in the court below filed the general issue and four special pleas. The first and second special pleas undertook to raise a federal question by reason of the fact that the message was an interstate message. The third and fourth special pleas set forth and pleaded the benefit of the following stipulation appearing on the telegraph blank as a part of the contract between Zemurray, the sender, and the telegraph company:

"No responsibility attaches to this company concerning telegrams until same are accepted at one of its transmitting offices, and if the telegram is sent to such office by one of the company's messengers, he acts for that purpose as agent of the sender."

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And the pleas expressly averred that the message in question was given by the sender to a messenger, and was never delivered to the company at its transmitting office, and that the company never in fact received, and therefore never undertook to transmit, the message. A demurrer was interposed to the third and fourth special pleas challenging their sufficiency in law. The demurrer submits that the stipulation relied upon by the telegraph company is against public policy and void; that the pleas admit the delivery of the message to a messenger, and a delivery to a messenger should be construed to be a delivery to the company for the reason that the company cannot plead its own negligence.

A demurrer was also interposed to special pleas 1 and 2. For the purpose of this opinion it is unnecessary to set forth the first and second special pleas or to notice the disposition which the trial court made of these pleas and the demurrer thereto.

The demurrer to the third and fourth special pleas was overruled, and, the plaintiff declining to plead further, judgment was entered in favor of the defendant. The present appeal challenges the ruling of the trial court in sustaining the demurrer to the third and fourth pleas and in entering final judgment therupon.

The only question for decision is whether the quoted, printed provision on the telegraph blank to the effect that the company's messenger in receiving the telegram for transmission acts for that purpose as agent for the sender is a reasonable and therefore a lawful stipulation. The authorities, we think, are in accord in upholding the validity of this stipulation. Gray's Communication by Telegraph, par. 13, p. 23; Jones on Telegraph and Telephone Companies, pars. 278 and 409; Am. & Eng. Ency. of Law (2d Ed.), vol. 27, p. 1051; *Ayres* v. *Western Union Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Stamey* v. *Western Union Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

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The special pleas set forth in detail that the telegram was given to a messenger and was never received at the transmitting office of the company and never accepted. If the provision relied upon by the telegraph company is a reasonable and lawful provision, it follows that the sendee cannot base an action in tort for a failure to deliver the message. The reasons why the stipulation under review should be regarded as a reasonable regulation are well stated by Judge LUMPKIN, speaking for the Georgia court, in *Stamey* v. *Western Union Tel. Co.*, *supra*. The opinion, among other things, says:

"The work performed by the messenger in carrying the message from the office or residence of the sender to the transmitting office of the company forms no part of the transmission of the message by the company, for which latter purpose alone the company makes a charge. There is nothing onerous or one-sided about the rule. It dictates no terms to the sender, and gives no advantage to the company. It is neither obligatory nor arbitrary. In a word, it gives the sender the alternative of delivering his dispatch to the messenger, to be delivered by him at the office of the company on the condition prescribed, or of making such delivery either in person or by his own servant. We have been unable to find a direct adjudication upon this rule by any court, and we think this shows, or tends to show, the consensus of public and professional opinion in favor of its reasonableness. The rule is held to be reasonable in the work of Gray on Communication by Telegraph, section 13, top of page 23. Assuming, then, the reasonableness of the rule, it follows, in the absence of other facts to the contrary, that the message was not delivered to the company, because it was not presented at one of its transmitting offices, by the agent of the senders, and was not accepted by the company. . . . Messengers of a telegraph company are not sent out from the company's office to solicit telegrams, and, being engaged in

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a most subordinate work of the company's service, it is to be presumed that they are not invested by the company with the powers of receiving the company's charges or fees for transmission of telegrams, and that they have no powers of rejecting telegrams offered to them, either for the nonpayment in advance of the company's charges for transmission, or for being illegibly written, or for containing matter which would make the company liable in tort or otherwise for transmitting an indecent or immoral telegram—all of which are powers preserved by law to the company for its protection, and with which it is known to the public, or should be, the receiving agent of the company at its transmitting offices is invested." 92 Ga. 615, 616, 617, 18 S. E. 1009, 1010, 44 Amer. St. Rep. 96, 97, 98.

Mr. Jones observes: "It is well known that the messengers are usually young and inexperienced boys, and of course are not familiar with the rules in regard to the proper messages to be accepted for transmission."

And further that, if a delivery to a messenger boy should be considered a delivery to the company "the latter would be liable for failure to send a message delivered to its messenger, although to do so would subject the company to an indictment or to an actionable wrong." Paragraph 278.

Mr. Gray adds a further and persuasive reason that: "Knowledge of the condition of the company's lines, and generally of the company's ability to communicate a message, is peculiarly within the scope of an operator's business; and it is his right and duty, on one hand, to disclose the fact if the company is unable to achieve what it undertakes to do, and, on the other, to be informed of any facts which may aid him in correctly performing the contract."

There is no fact or circumstance in this case to estop the company or to take the case out of the general rule under discussion. The point arises in this case upon

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the sufficiency of the defendant's special pleas, and the learned circuit judge was correct in overruling the demurrer. The plaintiff declined to plead further, and so the final judgment appealed from must be affirmed.

Affirmed.

HINES v. McGHEE.

[83 South. 402, In Banc. No. 20908.]

RAILROADS. *Failure to sound stock alarm when not proximate cause of injury.*

In a suit against a railroad company for the killing of stock, even though the engineer did not sound the stock alarm before the stock were struck, the company was not liable, where the evidence did not warrant a finding by the jury that the stock would have been frightened from the track by an earlier sounding of the stock alarm.

APPEAL from the circuit court of Tunica county.

HON. W. A. ALCORN, Judge.

Suit by E. H. McGhee against Walter D. Hines, Director General, The Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Montgomery & Dulaney for appellant.

The court erred in refusing to give appellant the peremptory instruction asked for. This is the only proposition that we have raised in this appeal. We contend that there is no conflict in the testimony at all. It is not disputed that the mules, having escaped, were

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running at a very rapid rate, right towards the engine of the train, in the night. That the train and engine were equipped with all necessary and proper appliances, and was in good condition; that the headlight of the locomotive was an electric headlight of the highest standard in general use; that the fireman was putting in coal; that the engineer was keeping a lookout; that he was going on a descending grade in the direction of the mules, at the rate of fifty-five miles an hour, the mules meeting him at about fifteen; that he could not stop his train within less than fourteen hundred feet, or more; that he could not see the mules over one thousand feet from him; that it was utterly impossible to stop the train, and that he did everything that was possible, not everything that he reasonably could, but everything possible, to avoid striking them, and that the accident was unavoidable. The witness for the plaintiff bore out the engineer in all of this. They were pursuing the mules, attempting to head them on other mules.

Counsel for appellee attempted to argue in the lower court, that because the two negroes in pursuit of the mules, themselves riding as fast as their mules, could run, say that the engineer blew two blasts of the whistle, and then struck the mules instantly, that they are in conflict with the testimony of the engineer as to this, because the engineer says "his left hand was on the throttle, which as soon as he saw the mules he closed, then applied his air with his right hand, then with his left hand applied the sand to the track, and with his right hand, sounded his stock alarm, at the instant of striking the mules."

Of course there is no conflict between the engineer and these two witnesses riding fast, who only heard two blasts of the whistle, as they recall it.

They do not dispute the testimony of the engineer that the engine slowed up, but they say they did not ob-

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serve it, and do not say it did not, but that it proceeded on its way, and speeded up after striking the mules, and about this there is no conflict.

It is not material whether the two blasts of the whistle were sounded or not, because it is certainly clearly testified by the engineer that everything was done that was possible to be done to prevent striking the mules, and that the accident was unavoidable, and in this he is not contradicted. *Louisville, New Orleans & Texas Railway Company* v. *Tate,* 70 Miss. 348.

This was a case where the mule killed was standing on the track when the headlight first reached it, and the engineer could not stop his train in time to avoid striking it, and it was held that the peremptory instruction was properly given. *C. St. L. & N. O. Railroad Co. v. Packwood,* 59 Miss. 280.

In this case chief Justice CHALMERS says: "The accident according to the testimony of these witnesses was unavoidable." "It seems to be, so far as we can see, a case where each side has met the burden imposed by law upon it and in which there is no conflict in the testimony of the witnesses. Where this is so, the verdict should be for the defendant, and a contrary one will be set aside by the court." *N. O. J. & G. N. Railroad Co.* v. *Field,* 46 Miss. 573.

In this case Justice SIMRALL, speaking for the court says: "The owner of cattle at large on the range takes the risk of injury, or total loss by the locomotive and train, if the cattle exposed upon the track could not be saved by prudence, skill and caution. The company is excused and justified where, after using the means suggested by skill, prudence and caution, the injury or destruction could not be avoided." *N. O., etc., R. R. Co.* v. *Bourgeois,* 6 Miss. 3.

In this case Chief Justice ARNOLD says: "It appears from the testimony of appellee, that at the places where two of these cattle were struck, the view along the

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track for several hundred yards was unobstructed, and that stock on, or near the track might have been seen that distance. This is not denied, but the engineer who was on the train, testified, and he is not contradicted on this point, that he did not see either of the cattle until they were so near the engine that he could not check or stop the train in time to save them, and that he sounded the whistle or stock alarm, and did all he could under the circumstances to prevent the collision but was unable to do so."

"It is not shown, or suggested, that the engineer could or should have done anything that was not done, after the cattle got on the track; but the contention is, that he might have seen them near the track, and should have reduced the speed of the train, or stopped it, before they came upon the track."

"Rapid movements, and regular connections are among the chief advantages of transportation by railroads. These are demanded both by interests of the public and of the railroad companies. Railroad companies, in the prosecution of their lawful business, have a right to a clear track, and to the exclusive use and enjoyment of their property, subject, of course, to the condition upon which all others own and use property, that they must so use it as not to injure the person or property of others, if it can be avoided by reasonable care."

"If an animal when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all the proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of the railroad companies than of other persons" *R. R. Co.* v. *Caldwell*, 83 Ala. 196.

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On the facts of the record the verdict should have been for the appellant; it was error to refuse the first instruction asked by the appellant.

A. & V. Railroad Co. v. *Stacy,* 35 So. 137. In this case the engineer and fireman testified that their engine, cars, bell and appliances were in good condition, and that their entire equipment was as good as any on any railroad in the entire state; that at the time of the accident the fireman was putting in coal, and did not see the animals; that the first he knew of any trouble, the engineer blew his whistle and shut off the steam when he looked up and saw the animals that were struck. The engineer testified that he was at his post, keeping a lookout; that he first saw the cattle on the south side of the track about one hundred and fifty yards ahead of the train, some ten or fifteen feet from the track; that when the engine drew close, the cow attempted to cross the track, the engine being then sixty or seventy yards from her, and when he saw her start across he blew the whistle, put on brakes, and shut the steam off, so as to keep from striking her, but it was impossible to keep from striking her; that he did everything in his power to prevent the accident. Justice TRULY speaking for the court says: "The undisputed facts disclosed by this record entitles defendant to the peremptory instruction." *L. N. O. & T. Railway Co.* v. *Smith,* 67 Miss. 15.

This was a case where there was no material conflict, and Justice CAMPBELL says:

"The court should have given the instruction asked by the defendant that the verdict should be for it. There is no conflict in the evidence, and that of the defendant which consists with that of the plaintiff, exonerates the defendant from all blame." *Y. & M. V. R. R. Co.* v. *Jones,* 71 So. 309.

In this case the engineer testified that he was running about fifty miles an hour in the country; that he

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was in his proper place in the engine keeping a lookout ahead, and that his headlight revealed the mules on the track about four or five hundred feet ahead of him; that the engine was properly equipped, and all equipment was working well; that he immediately shut off the steam, blew the stock alarm, and applied the emergency brakes, and did all that he could do to prevent the accident, but that the train could not have been stopped in less than twelve hundred feet after the brakes had been applied, and that the mules were struck by the engine before the engine could be stopped; that the train ran about four hundred feet after he first discovered the mules until they were struck; that they were running up the track when overtaken and struck, and that the accident was unavoidable. Presiding Justice COOK, speaking for the court, says:

"We have examined the evidence taken at the trial of this case, and it seems clear to us that the defendant below met the burden imposed by the prima-facie statute. The defendant showed just how, and under what circumstances the mules were injured by the running train. It appears that the engineman did everything possible to avoid striking the animals after he saw them. We can find nothing in the testimony of plaintiff's witnesses in conflict with the testimony of the engineman. We may admit all that plaintiff's evidence tends to prove, and yet we are unable to see wherein the defendant's witnesses are contradicted. It stands undisputed that the train crew were not negligent when they discovered the mules on the track."

"There is no obligation on the servants of the company to keep a lookout for trespassing stock. We think the engineman gave a perfectly valid reason for his not seeing the mules earlier, and we can find no facts or circumstances warranting the belief that he falsified. We are unable to say that the engineman's statement of the facts is unreasonable, in the absence of any evi-

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dence tending to a contradiction thereof, and we find no such evidence in the record."

Applying these authorities, especially the last authority just cited, to the evidence in the case at bar, we respectfully submit that there is nothing to contradict the testimony of the engineer, that he did everything that he could, after seeing the stock to prevent striking them, and that the peremptory instruction for the appellant should have been given. We therefore ask that this case be reversed, and judgment entered here for the appellant.

J. F. Robinson and *J. D. Magruder,* for appellee.

It was no error to refuse to direct a verdict for the defendant; whether it was negligence for the engineer to fail to see the mules was a question for the jury. *Kent* v. *Louisville, etc., R. R. Co.,* 67 Miss. 609, 7 So. 391.

Chief Justice WOOD, rendering decision in this case says: "We cannot say, looking at the whole case on its undisputed facts, that there is nothing proving negligence or tending to prove it. The injury occurred on a clear, starlight night on a straight track and in open fields; the animal ran rapidly for three hundred yards down the track in front of the locomotive. The engineer testifies that he was at his post and on the lookout, but that he only saw the animal when within twenty or thirty yards of her, and that it was impossible then to stop the train in time to prevent the accident. Whether there was negligence in the engineer's failing to see the animal for two hundred and seventy or two hundred and eighty yards, under the circumstances was a question proper to be submitted to the jury; for admitting that the engineer did not see the animal, the question remains, could he, and ought he to have done so"

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In the instant case it is undisputed that the track is perfectly straight for a mile each way from the place where the mules were struck; that the mules had been running on the track for about a half mile, and that the train was equipped with a powerful electric headlight, facts making it possible for the engineer to have seen the mules in time to stop the train before striking them.

We contend that there was very material conflict in the testimony offered by plaintiff and defendant on the trial of this cause; true, there is no positive denial of the testimony of the engineer as to his efforts to stop the train, and indeed there could not be, but his statement that he sounded the alarm when he was eight hundred to one thousand feet from the place where the mules were struck, is positively contradicted by witnesses of plaintiff, as is his statement that the train slowed up. Witnesses for plaintiff stated, positively, that the whistle was not blown until about the time the mules were struck, and that the train did not slacken its speed. Even under the very searching examination of able counsel for defendant, these witnesses stated that they could not perceive that the train slowed up.

"When the evidence in an action to recover for an animal killed on the railroad track is conflicting as to the distance of the train from the animal when it comes on the track and the efforts made to avert the accident and subsequent injury a peremptory instruction for the defendant should not be given, but the case should be submitted to the jury." *Quinn* v. *Southern R. R. Co.*, 21 So. 6, not officially reported.

"In order to overcome motion for peremptory instructions and send the case to the jury it is only necessary that the evidence tend to contradict that of defendant." *Baird* v. *Georgia Pacific R. Co.*, 19 So. 661.

In the case at bar the testimony of the engineer and fireman that all possible was done to stop the train is

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contradicted by the statement of plaintiff's witness that the alarm was not sounded when the engineer claims he first saw the stock and that the train did not slow up.

In the cases cited in the brief of counsel for appellant there were no eye witnesses to the killing of the stock, and plaintiffs in their cases were dependent upon the prima-facie case made by the circumstances of the stock being found dead by the track, which differentiates them from the instant case. Unfortunately for the appellant in the case, at bar there were present witnesses who testified that the facts were other than stated by witness for appellant.

It is plainly stated in the decisions cited by appellant the *prima-facie* cases were met because of the absence of testimony disputing defendant's claim of reasonable care etc., and for that reason the court should have peremptorily instructed the jury to find for the defendant.

The case at bar is clearly one for the jury. It is not contended that appellant failed to meet the burden of a *prima-facie* case, but having met same, it was then confronted by testimony of appellee disputing the correctness of the statements of its expert witnesses, and having done so, the court below was eminently correct in overruling defendant's motion for peremptory instruction. The testimony of Hobson and Williams, witnesses for plaintiff, and the surrounding circumstances of this case take it out of the class of cases cited by appellant in its brief.

Even in the case of *Yazoo & Mississippi Valley Railroad Co.* v. *Jones,* the last case cited by appellant, and the one he seems especially to rely upon, there was no evidence by plaintiff beyond making the *prima-facie* case of finding the stock dead along the railroad track, and the defendant having met the burden placed upon it by the *prima-face* case by proving the circumstances of

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the accident, and that it had done all in its power to avoid the accident, and there being no evidence to the contrary, the court rightfully ruled that the peremptory instructions should have been given.

In the instant case, however, there was material evidence by the plaintiff negativing the proposition that all possible was done to stop the train and avoid the accident, and we respectfully submit the case confident that the court will affirm the judgment of the lower court in overruling the motion for peremptory instruction for defendant and allow the judgment to stand.

SMITH, C. J., delivered the opinion of the court.

The only substantial conflict in the evidence is with reference to whether or not the engineer sounded the stock alarm before the mules were struck by the train, but, conceding for the sake of the argument that the stock alarm was not sounded before the mules were struck, and that the engineer was negligent in not having sounded it earlier, nevertheless the peremptory instruction requested by the appellant should have been given, for the reason that the evidence will not warrant a finding by the jury that the mules would have been frightened from the track by an earlier sounding of the stock alarm.

Reversed and judgment here for the appellant.

Reversed.

BUCKLEY v. STATE.

[83 South. 403, In Banc. No. 20682.]

BANKS AND BANKING. *Evidence of gross negligence in a director not sufficient to convict of knowingly receiving deposits.*

Under Code 1906, section 1169, a bank director cannot be convicted, for receiving deposits "having good reason to believe that the

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bank was then and there insolvent" merely upon evidence showing him to have been grossly negligent in the discharge of his duty as a director of the bank.

APPEAL from the circuit court of Wayne county.

HON. R. W. HEIDELBERG, Judge.

M. W. Buckley was convicted of recovering a deposit having good reason to believe the bank insolvent and appeals.

The facts are fully stated in the opinion of the court.

Watkins & Watkins, for appellant.

Ross A. Collins, Attorney-General, for the state.

SMITH, C. J., delivered the opinion of the court.

On January 24, 1914, the president of the Bank of Enterprise, which was then insolvent, and of which the appellant was a director, received a sum of money for deposit in the bank without informing the depositor of the banks insolvency. Afterwards the appellant was indicted under section 1169, Code of 1906, for receiving the deposit "having good reason to believe that the bank was then and there insolvent," and this appeal is from a conviction therefor. It will be unnecessary, and in fact would be difficult, to set forth the voluminous evidence on which the appellant was convicted, but it will be sufficient to say that, while it appears therefrom that the appellant was grossly negligent in the discharge of his duty as a director of the bank, a majority of the court is of opinion that there is nothing in the evidence to warrant a finding that his knowledge of the affairs of the bank at the time the deposit was received was such as to cause him to have good reason to believe the bank to be insolvent; consequently the peremptory instruction requested by him should have been given.

Reversed, and judgment here for the appellant.

Reversed.

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ETHRIDGE, J. (dissenting). In my personal and private capacity (to borrow an expression from Attorney Wemmick in Dickens' Great Expectations), and because of friendship for the family of the appellant, I am glad that my Brethren have found a way to relieve appellant from a conviction; but in my official and judicial capacity I cannot agree that the evidence is insufficent to warrant a jury in finding him guilty. As the sufficiency of the evidence is the only difference between the members of the court, I merely dissent to prevent the facts in this case being presented as a precedent in future cases.

TURNER v. STATE.

[83 South. 404, In Banc. No. 20977.]

1. CRIMINAL LAW. *Necessity of stating defense in application to withdraw plea of guilty.*

   Where, in a criminal case, a plea of guilty is entered and is afterward sought to be set aside, the applicant should at least state the substance of his defense, so that the court may judge of the merits.

2. CRIMINAL LAW. *Trial court's statement accepted as true on appeal, as against ex parte affidavits.*

   The trial judge's statement on appeal must be accepted as true as against a mere *ex parte* affidavit, especially where the statements made by the judge are not directly contradicted.

3. CRIMINAL LAW. *Refusal to permit withdrawal of plea of guilty sustained.*

   Where in a criminal case a defendant entered a plea of guilty and afterwards sought to withdraw such plea stating in his application to withdraw that the plea of guilty was made through ignorance, but did not set forth the facts alleged to constitute a defense, and the trial court stated in the record that accused had made a full statement regarding the offense charged when the plea of guilty was entered which statement of facts was no defense. In such case there was no abuse of discretion in denying the application.

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APPEAL from the circuit court of Simpson county.

HON. H. H. HUGHES, Judge.

George Turner's motion to withdraw a plea of guilty to assault with intent to kill and enter a plea of not guilty was denied and he appeals.

The facts are fully stated in the opinion of the court.

A. M. Edwards and *J. J. Stubbs,* for appellant.

Section 28 of the constitution of the state of Mississippi reads as follows: "Cruel or unusual punishment shall not be inflicted nor excessive fines be imposed." Viewing the two sentences, in the cases against appellant for the charges preferred, is it not apparent that the same is manifestly unusual and cruel? Or that the court was actuated by fear of mob violence and to appease the hot blood against appellant, that such sentences would preserve the peace and no effort would be made towards mob violence. If either be true it is in strict violation of the Constitution, section just above cited.

12 Cyc. at page 788, we find the following language: "The court may, during the term, for good cause shown and in its discretion, set aside a judgment of conviction entered on a plea of guilty, or on a verdict of conviction; and the power may be exercised by the court within its discretion even where the accused has partially served his term of imprisonment."

"When a defendant has pleaded guilty in a criminal case, the general rule is that it is within the discretion of the trial court to permit the plea to be withdrawn on motion." Many authorities are cited under this announcement of the rule from other states. Our own state has spoken on this thought more than one time. In the case of *Mastronada* v. *State,* 60 Miss. 86, this court adhered to this rule, while in this case the same was affirmed upon the idea that appellant in that case did not allege in his supporting affidavit to his motion

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that he was not guilty of the charge laid, but it seems that if he had so alleged upon his affidavit alone, that the decision of the court would have been otherwise.

The court's attention is further and especially called to the case of *Deloach* v. *State*, 77 Miss. 691, 27 So. 618, in which the court held that it was within the discretion of the court to permit one to withdraw his plea of guilty, but that the same was a judicial discretion, which should always be exercised in favor of innocence and liberty. In this same case we have the following language: "That the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence; it is the English practice not to receive such plea unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment." In this same case the court had this further statement, "all courts should so administer the law and construe the rules of practice as to secure a hearing upon the merits if possible." The law favors a trial upon the merits by a jury, and this is all that appellant has asked, which have been denied him by the court below. Will this court grant appellant a trial by a jury, as favored by the law? Manifestly he is entitled to a trial by a jury under the authority cited.

The court's attention is further called to the case of the *State* v. *Calhoun* (Kansas Case), 34 Am. St. Rep. 141. In this case the defendant entered pleas of guilty to two charges (just as the case at bar), and under a hearing of error by writ of *coram nobis* the said pleas of guilty were set aside and the defendant permitted to go before a jury of his country with his causes of action. These pleas of guilty were entered because the defendant feared mob violence, just as the case at bar and in that case there was no more evidence of mob violence than is shown in this case. With the law favoring beyond question a trial on the merits of any criminal

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case, will the court deny this defendant this right granted to him by the organic law of the state? The withdrawal of a plea of guilty should not be denied in any criminal prosecution, where it is evident that the ends of justice will be subserved by permitting the substitution of the plea of not guilty. See American and English Annotated Case, Vol. No. 8, from 235 to 240. It being the pronounced policy of our law, that all criminal cases be tried on their merits before a jury and this being all that appellant asks, we respectfully submit that this case should be reversed and the appellant permitted to go before a jury with his cause.

R. M. Bordeaux, assistant attorney-general, for the state.

As we understand this record the only question presented for decision on the appeal is; "did the trial judge, in the court below, abuse his judicial discretion in overruling appellant's motion?

The learned trial judge in his order, overruling appellant's motion, states that appellant was given every opportunity to have a fair trial and that he was permitted by the court to make a full and complete statement as to how the shooting occurred, and his own statement in open court showed that he was guilty without a mitigating circumstance.

Counsel for appellant assails the propriety and denies the force and validity of an unsworn and gratutious statement by the circuit judge in making his order.

We submit, however, that if the showing on this motion made on behalf of the state is unsatisfactory, then the showing on this motion made on behalf of the appellant is equally unsatisfactory in this, to wit: the defendant in the court below introduced no evidence whatsoever to sustain his motion, but merely relied on the sworn motion itself.

We think that the appellant should have introduced the evidence to sustain the charges and allegations in

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his motion so that the state could thereby be given the opportunity to cross examine appellant, and to rebut and controvert the evidence of the defendant; that is to say, to contest the truth of the statement made in appellant's motion.

The appellant having made the motion, and the motion containing allegations of fact, we think it was incumbent on the appellant to offer evidence to sustain the allegations that he made.

In other words, we think that this record is so deficient that this court cannot say from this record, as presented by the appellant, that there has been an abuse of judicial discretion.

ETHRIDGE, J., delivered the opinion of the court.

George Turner, the appellant, was indicted in the circuit court of Simpson county for an assault with inten to kill and murder one Lawrence Buchanan, and was arrested on said charges and entered a plea of guilty thereto, and was sentenced to serve a term of ten years in the state penitentiary. Subsequent to entering a plea of guilty the appellant filed his motion to be allowed to withdraw his plea of guilty and enter a plea of "Not guilty," and to be allowed to have a trial on the merits, alleging in his petition that he was an ignorant negro and did not know and was not advised of his legal rights at the time he entered the plea of guilty; that he was not guilty of the crime charged in the indictment and on a hearing of this cause on its merits would disclose this fact to the court and jury; that, being ignorant of his legal rights, he was advised, and relied upon the said advice, that it would be best to enter a plea of guilty as charged; that in the shooting a white man of high standing is alleged to have been shot by the defendant, and at the time of entering said plea of guilty defendant was in great fear that if he did

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not enter a plea of guilty he would be killed, or that great bodily harm would be done him; that said plea of guilty was made at a time when he was in great fear of mob violence against him, same having been threatened, and defendant having been placed in jail at Jackson, Miss., to prevent mob violence, as the defendant believed and understood; that at the time said bill was entered defendant was away from both white and colored friends and had no lawyer or white man to advise him of his legal rights and since he was advised of his legal rights he began then and there to arrange to present this motion to the court to be allowed to have a hearing on the merits, knowing that he is not guilty of the charge alleged; that the defendant did not know and was not advised that the shooting of a human being was under any circumstances justifiable under the law; that he did not know that he had a right under the law to shoot a man for his own self-preservation, and if he had known that this right was with him under the law that he would have entered a plea of not guilty; that defendant sought advice of his rights, but, being incarcerated in jail, his opportunity was very limited, and those to whom he did speak informed him that it took money to get advice, and, being without money or means to obtain legal advice, when called upon to answer said charge, that he did not know at the time he entered the plea of guilty what said plea meant, but entered said plea, expecting to be put on trial for the crime alleged until he was otherwise advised by counsel whom his friends employed for him; that the application for a trial on the merits is not made for delay, nor to experiment with the court, but that justice may be done; that if defendant's motion is granted and he is allowed a trial on the merits of the cause, he will endeavor to make ready for trial during the present term of the court, which he believes can be done. The motion was sworn to by the appellant, but no proof

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was offered on the hearing by either the applicant or by the district attorney, but the trial court overruled the motion, and the order overruling the motion embodied the following statement:

"The court having heard the same, it is ordered that said motion be, and the same is hereby, overruled, because at the time the defendant was arraigned and pleaded guilty to said charge he pleads guilty, having opportunity to have a fair trial, and, further, because the defendant was permitted by the court to make a full and complete statement as to how the shooting occurred and his own statement in open court showed he was guilty without a mitigating circumstance,"— to which action of the court the defendant excepts in overruling the motion.

It is contended by the appellant that, inasmuch as the petition was sworn to, and that no counter affidavit was filed by the district attorney, the trial judge abused his discretion in refusing to set aside the plea of guilty and permit a trial on the merits.

It will be noted that the application to set aside the plea of guilty does not state the facts showing a meritorious defense, nor what proof the appellant could introduce to make out a cause of justification; the applicant merely saying that he is not guilty. Where a plea of guilty is entered and is afterwards sought to be set aside, the applicant should at least state the substance of his defense, so that the conrt may judge of the merits. 17 Am. & Eng. Ency Law, 846. However, we see from the statement of the judge that when the defendant entered a plea of guilty he was permitted to make a statement to the court of the facts, and from such statement made, the judge states there is no mitigating circumstance or moritorious defense. It is argued that the judge's statement at most amounts to mere opinion, and should not be considered as it is claimed

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to be no part of the judgment: In *Gurley v. State*, 101 Miss. 190, 57 So. 565, this court said:

"The supreme court on appeal must accept as true the statement of the trial court of its recollection of the proceedings sought to be reviewed."

This statement may be too broad under a possible case, but it certainly is true that the judge's statements must be accepted as true as against a mere *ex parte* affidavit, especially where the statements made by the judge are not directly contradicted. The circuit judge must be held to be impartial and unprejudiced in the absence of an express showing that he is otherwise. It seems to us that, if the appellant was not satisfied with the correctness of the facts stated in the judgment, he should have tendered a bill of exceptions to the judge, and if the judge refuses to sign the bill of exceptions, it should be presented to and signed by two reputable attorneys, as provided by statute in cases where the judge refuses to sign a bill of exceptions. Where the defendant on entering a plea of guilty states his version of the facts, and if those do not constitute justification or excuse, it would be improper to set aside a plea, unless it clearly appeared that such statements were made under duress or mistake or other cause that would satisfy the trial court that the statement made on entering the plea was untrue. We are unable to say that the trial judge abused his discretion; and reaching this conclusion makes it unnecessary for us to decide now whether or not an appeal would lie from a plea of guilty under the provisions of chapter 151, Laws of 1914, on an application of the kind now before us.

The judgment is affirmed.

Affirmed.

HOLDEN, J., dissents.

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EQUEN ET AL. v. ARTERBURY ET AL.

[83 South. 406, In Banc. No. 20858.]

1. DRAINAGE. *Legislature to provide for establishment.*

It is the province of the legislature to provide for the establishment of drainage districts and the authority, as well as the procedure, for the creation of the drainage district, is governed by the statute.

2. DRAINS. *Concurrent jurisdiction of courts in either of two counties to establish.*

Under Laws 1914, chapter 269, section 1, providing that if land in more than one county is embraced in a proposed drainage district, the application should be made to the chancery court of either county, and all proceedings should be had in such chancery court, does not withdraw jurisdiction to establish such a drainage district from a chancery court because proceedings had originally been instituted in the court of another county.

3. DRAINS. *Dismissal of petition not res judicata.*

The action of a chancery court in dismissing a drainage petition does not render the matter *res adjudicata* so as to preclude favorable action by the chancery court of another county on substantially the same petition, especially since Laws 1912, ch. 269, section 4, provides that engineers' reports, surveys, etc., in the first proceeding shall be paid for as part of the cost in a subsequent proceeding.

APPEAL from the chancery court of Leflore county.

Hon.. JOE MAY, Chancellor.

Petition for the establishment of a drainage district by Thad Arterbury and others, opposed by J. S. Equen and others. From an interlocutory decree confirming the report of a commission, the opposing parties appeal.

The facts are fully stated in the opinon of the court.

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Noel & Jordan, for appellant.

I will deal with but two aspects of the case leaving the presentation of authorities to the opening brief of appellants.

So far as I could gather from their brief, there was practically no attempt to meet the proposition and authorities supporting the contention that, Holmes county chancery court has exclusive jurisdiction. If there had been nothing else but the statute constituting chapter 195 of the Laws of 1912, as amended by chapters 269 and 271 of the Laws of 1914, our position on this point would be sustained.

Section 1, chapter 269, of the Laws of 1914, provides: "If land in more than one county is embraced in the proposed district, the application shall be addressed to the chancery court of any county in such district; and all proceedings shall be had in such chancery court."

The first proceedings were in the chancery court of Holmes county and for a larger district. The second effort was under the same law and for the same lands, and being an action *in rem,* fixed the rights of all interested in such lands. All subsequent proceedings, if any were maintainable, should have been in the chancery court of Holmes.

Regardless of this statute, the authorities cited in appellant's opening brief for the position that the court of the county in which concurrent jurisdiction is given that first exercise such jurisdiction, retains exclusive jurisdiction, are unanswerable and no attempt is made to answer them or present counter authorities. Therefore, on this initial proposition, the exceptions and objections of appellants should be sustained and the proceedings dismissed.

The decree of the Holmes county chancery court is *res adjudicata.*. The subject-matter of controversy in

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this suit, drainage for certain lands in Holmes, Leflore and Carroll counties is exactly the same subject-matter that was involved in the chancery litigation in Holmes county in which decree was rendered dismissing the petition, simply retaining jurisdiction for the purpose of apportioning and collecting costs. It was a proceeding, as is this, not to affect the petitioners or counter petitioners otherwise than by subjecting or relieving certain land of certain charges. It was strictly a proceeding *in rem*, affecting the lands and the lands only, regadless of their ownership. Therefore, the question of whether or not there has been some change in ownership between the time of the Holmes county suit and the institution of this suit is wholly immaterial. The sole question in each is whether or not a drainage district should be established embracing the lands in controversy and whether it was and is maintainable under the statutes above referred to, chapter 269 of the Laws of 1914, embracing the particular provisions in controversy.

The chancery court of Holmes county, after full and thorough investigation and after preliminary survey and report were made, evidence and argument heard, dismissed the bill, holding that while the establishment of the district might be for the advantage of owners of real property therein, that it was not for the public benefit. No appeal was taken from that decision and it stands now in full force.

The attempt to meet this decision on a drainage proposition that does not affect one acre in a thousand comparing it with a creation of public roads which touches every acre of land everywhere, is utterly untenable.

Every owner of land is entitled to an inlet and an outlet. Public roads are used by all occupants of lands everywhere and are an absolute necessity. If one proposition for creating a public road fails, it does

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not defeat other propositions, under different circumstances, for the necessity for public roads remains and must be met in some way, otherwise the ownership of land is valueless, lands hemmed in with no means of ingress or egress are prisons, places of punishment and not a profit or pleasure. Drainage, in the sense used in the drainage laws consisting of large drainage ditches covering different counties or portion of one county are questions that do not affect one per cent of the cultivated lands in this state, are not necessities and may be a deteriment, as in this case, to adjoining landowners and so determined by the courts, even if not otherwise than greatly beneficial to the owners of the territory in the district. To hold that the decisions supporting this view of the law mean nothing, and that one suit can be instituted as soon as another is finished, covering the same subject-matter, law and persons, seems to me utterly untenable.

The requirement of the decree and the law that drainage maps and other parts of the record of drainage contests should be preserved, indicate no purpose of making the decision otherwise than final. In all land cases, final records are required to be preserved. The maps and drainage data, showing the levels of the lands, would be worth something to the owners of the property who paid for it, even if the suit is dismissed; of course, the maps and other records should be preserved for in this way only could the plea of *res adjudicata* be sustained and some return he had for outlays incident to the survey which is made a tax on all of the lands.

Pleadings of appellants are proper and legal. Very few chapters covering proceedings of drainage or other matters are complete laws within themselves. It is an elementary principle that the common law, equitable rules and the statutes cover all subjects that are justiciable. The statutes merely displace or modify

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common low or equitable rules or are declaratory of the same, whether these rules be of pleading or of substantive law.

Pleadings are nothing more than presentation of the questions of fact on which the complaining or defending party relies; our statutes on the subject, declaratory of common law, are found in sections 729, 739, and 687 of the Code of 1906 and sections 512, 522, and 465 of Hemingway's Code. They declare this principle is applicable to all courts and to all pleadings.

Besides, the statutes in controversy, embodied in chapter 269 of the Laws of 1914, so far as it affects this case are not susceptible of any such narrow construction, and do not attempt to prescribe rules of pleading.

The petitions in this case set out certain facts, including the proportion of landowners and of lands represented with the allegation that it is to the best interest of the owners of the real property and for the public benefit that the district should be established. All of these and other material allegations are denied and affirmative defenses including plea of *res adjudicata* and of want of jurisdiction in the Leflore chancery court are set up in the answers and counter-petitions.

These answers and pleas are met with a bald proposition that the law in question, chapter 269, of the Laws of 1914, absolutely require the establishment of a district whenever the requisite proportion of landowners is obtained without a counter-petition being presented by a majority of the landowners, owning one-third of the land, or one-third of the landowners owning a majority of the land, be presented to the court praying that the drainage be not made. Such is not the law. Both sections 1 and 2, pages 330 and 332 of the Laws of 1914, provide that the district shall not be established, regardless of the number of signers, unless it is "for the public benefit." Section 1 further provides:

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"At the time named in said notice, said board shall meet and hear all property owners within the proposed drainage district who wish to appear and advocate or resist the establishment and if it deem it is to the best interest of the owners of real property within the said district and for the public benefit, that same shall become a drainage district under the terms of this act; it shall make an order upon its minutes establishing same as a drainage district." Laws of 1914, p. 330-31.

Practically the same provision is contained in section 2, page 332, containing the further clear declaration that if no petition, referring to counter petition, is filed, still "it shall be the duty of the board of supervisors, or the chancellor to investigate as provided in the preceding section, and to establish such drainage district, and if it is of the opinion the establishment thereof will be to the advantage of the owners of real property therein and is for the public benefit."

This shows, by a proviso, that it is the duty of the court, even where the point is not raised by counter petitions, to make an investigation of the advisability of the creation of the district and to determine, after such investigation, and by its decree to voice such determination, of whether or not the creation of the district is for the public benefit.

Therefore, we submit that appellants are clearly within the bounds of their rights in resisting, with or without written pleading, the creation of the district and of assisting the court in its investigation of the facts set forth in the petition especially as to whether or not the drainage district is for the public benefit.

The prescribed statutory proceedings. Section 1 of chapter 269, of the Laws of 1914, provides that when ten per cent., of the owners of property in a proposed drainage district petition a board of supervisors, where the land is all in one county, or the chancery court of

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one of the counties where the land is in two or more counties, it shall be the duty of the board, or of the clerk of the chancery court "to publish a notice, in a newspaper having circulation in the proposed district for two successive insertions, directed to the owner of the land proposed to be embraced in the proposed district, giving notice of the intention of the board to take action looking to the organization of the district, and upon the day designated in the notice, the board shall hear all objections, if any are offered to the organization of said district, and unless at the hearing a majority of the landowners owning a majority of the land proposed to be included in the proposed district shall object to the organization, the board shall proceed as hereinafter provided," etc. In either event, the board can create a preliminary organization of the district, appoint preliminary engineers, commissioners, etc.

When these commissioners and engineers report, under this preliminary organization, a second publication is provided for of two weeks, "calling upon all persons owning property within said district to appear before the board of supervisors, upon a date to be fixed by said clerk, which shall not be earlier than twenty days and not later than forty days after the first publication, to show cause in favor of or against the establishment of the district."

Then after this second publication, there is a second opportunity offered for objectors to appear and resist the establishment of the district.

The provision of the law in question relied upon by opposing counsel, pertain to this second hearing after the second advertisement, the advertisement following the prelinminary organization and report. the extracts from this law, cited above in this brief, and foundon pages 330, 331, and 332, relate to this second hearing and not to the first hearing as a careful reading of the statute will show.

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Appellees, in their brief, deal with but one publication and with but one opportunity for hearing, relying upon the adjudication of the chancery court, at its October Term, without previous publication, to establish their right to all the benefits from having the required majority of landowners and land. This decree was rendered without any sort of notice, actual or constructive, on appellants or any other landowners; and quite a number of landowners, shown by the petition and exhibits have not appeared in this proceeding at all, either in support or opposition to the establishment of the drainage district. These are not before the court at all and have never been given the notice required for the preliminary organization and for the determination of whether or not one-tenth or more of the landowners did sign the original petition.

The statute was not written by a lawyer, very evidently,and is not clear, in many respects, but it does show that there are two publications to be made and two opportunities afforded, one as to whether or not the preliminary organization would be established or created; and the other as to whether or not, in view of all of the facts developed by the preliminary survey, the district should be created or the temporary organization made permanent.

We respectfully submit that opposing counsel lost sight of the requirements as to these two meeting and have sought to blend them in one. We respecfully submit that the petition should be dismissed and the objections thereto sustained.

Gardner, McBee & Gardner, for appellants.

Drainage districts must be for the public benefit. Laws 1912, chapter 195, sec. 2, page 214; Laws 1914, chapter 269, sec. 2, page 333; *Jones* v. *Drainage District,* 102 Miss. 796. Whether or not a drainage dis-

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trict is for the public benefit is a judicial question. 9 R. C. L. 624; *Sission* v. *Buena Vista Co.*, 128 Iowa, 442; 70 L. R. A. 440; *State* v. *Polk Co.*, 87 Minn. 325, 60 L. R. A. 161; *Priewe* v. *Wisconsin State Land Co.*, 93 Wisc. 524; 33 L. R. A. 654; *Northern Drainage District* v. *Bolivar County*, 71 So. 382.

The prior judgment rendered by the chancery court for Holmes county is binding upon the parties herein, and is not open to collateral impeachment, and it may be here pleaded, and it operates as an estoppel. 23 Cyc. 1408,; Freeman on Judgments 657; 2 Black on Judgments, page 1203; 15 R. C. L. 629; 15 R. C. L. 641; Black on Judgments, 1217; *Molohan* v. *Cashin*, 101 N. E. 264.

It is not essential to the operation of a judgment or decree as an estoppel that it would be legally right; it is binding, however erroneous. Black on Judgments, 779.

A judgment when offered in evidence does not tend to prove a given fact, it proves, it conclusively, and suffers no contradiction. Black on Judgments, 776. Any fact or question distinctly put in issue, cannot be disputed in a subsequent suit even though the second suit be upon a different cause of action. Black on Judgments, 765; *So. Pac. R. R. Co.* v. *U. S.* 168 U. S. 1, 42 (L. Ed.) 355. A judgment cannot, while it stands in full force and unreversed, be attacked in a collateral proceeding. *Wall* v. *Wall*, 28 Miss. 407; *Cason* v. *Cason*, 31 Miss. 595; *McLeod* v. *Harper*, 43 Miss. 49; *Tarleyton* v. *Cox*, 45 Miss. 438; *Crownwell* v. *Craft*, 47 Miss. 59; *Cary* v. *Dickson*, 51 Miss. 598; *Wallis* v. *Loeb*, 59 Miss. 172. No compulsory nonsuit in Mississipppi. *Ewing* v. *Glidwell*, 3 How. 332; *Winston* v. *Miller*, 12 S. & M. 550. When a bill is dismissed, it is presumed to be on the merits, unless it appear in specific terms that the dismissal was without prejudice. Black on Judgments, 1083.

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Between courts of co-equal authority, the first to acquire jurisdiction, will retain it to the exclusion of all others, to the end of the litigation. *Ervin* v. *Mallison,* 65 Kan. 494, 93 Am. St. Rep. 299; *Coleman* v. *State,* 83 290.

A judgment without notice, either actual or constructive to the defendant, in utterly void. *Ex Parte Hafron,* 7 How. 127, *Enos* v. *Smit,* 7 S. & M. 85; *Duncan* v. *Jerchine,* 59 Miss. 550; *Jack* v. *Thompson,* 41 Miss. 49.

E. L. Mounger, for appellee.

This is a statutory proceeding and the statute defines the powers of the court and prescribes the method of procedure and pleading. The only question the court can investigate is whether, or not, a proper petition is before the court in case the petition is signed by the requisite number of landowners. If the petition is signed by one-third of the landowners owning a majority of the land in the proposed district, or a majority of the landowners owning one-third of said land, the court has no discretion. It is bound by this fact and it must proceed to organize the district as prayed for, "without further inquiry" unless a counter petition is filed signed by a majority of the landowners owning a third of said land or a third of the landowners a majority of said land. The statute, section 2, chapter 269, Laws of 1914, leaves the matter of such organization entirely with the landowners.

No counter petition was ever filed in this cause. Ten persons appeared and filed objections, but they do not profess to comprise a third of the landowners or to own a majority of the land in the proposed district. In fact, we submit that only five of these objectors are shown by the record to own any land in the district, to-wit: Rogers, Pike, Downer, Otto and Sutphen, and

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they own a very small acreage in the district. We submit that the record shows that the appellants, Yazoo & Mississippi Valley Railroad Company, Equen, Morgan, Towens, and Killibrew own no land and are mere interlopers and have no interest or rights in the proceeding whatever.

The objectors have not followed the prescribed method of making objection, and their objections cannot be heard at this state of the proceeding. *Nugent* v. *Jackson,* 72 Miss. 1040; *Williams* v. *Cammack,* 27 Miss. 209. It is well settled that the legislative authority to provide for the drainage and reclamation of swamp lands and the prevention of floods may be exercised by the creation of local drainage districts and the delegation to such districts of the power to inaugurate and control systems of drainage and reclamation within their boundaries and to assess the costs of the same against the property benefitted thereby (9 R. C. L. Page 642); and our legislature has exercised this authority and prescribed the procedure. The legislature could authorize the forming of such districts upon such terms as it deemed best. *Drainage District* v. *Bolivar County,* 111 Miss. 250. The legislature has provided a complete scheme, *Jones* v. *Drainage District,* 102 Miss. 796. The statute provides the only method by which objection can be made to the organization of the district. *Wilkinson* v. *Gaines,* 96 Miss, 688; *Owens* v. *Levee Commissioners,* 74 Miss. 369 9 R. C. L. 631. The right to remonstrate being a statutory right must be exercised in strict compliance with the statute. 7 Eng. Plea. & Prac., p. 217; *Brown* v. *Beatty,* 34 Miss. 227, 69 Am. Dec. 389, 15 Cyc., p. 980.

As the petition alleged and the affidavits and the certificates of the clerks on file showed, that a third of the landowners owning a majority of the land, and a majority of the landowners owning a majority of the

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land had signed the petition, it was proper, though not necessary, that the notices published by the clerk should state that unless at the hearing of the petition a majority of the landowners owning a third of the land proposed to be included in the district or a third of the landowners owning a majority of said land, should object, the court would then and there proceed with the organization of the district as provided by law; and the order for publication directed the clerk to so state in the notice. The law expressly provides that the district shall be so organized unless such protest is filed and the chancellor has no discretion in the matter, and it was but fair that notice of this should be given. Hence, the decree recited that "it appearing" that the necessary one-third had signed; the clerk was directed to give such notice, accordingly. The counsel contend that this was an adjudication by which they were greatly injured and that they were deprived of a hearing and therefore all further proceedings must end in this matter and counsel insist that they are entitled to a hearing, and cite the Constitution of the United States and many authorities to establish their right to a hearing. As a matter of fact the sole purpose of the order complained of was to direct that they be given notice and set a time for their hearing, and from that time to this a very considerable part of the time of the court and commissioner has been consumed in giving them a hearing. Whatever they may have to complain of, it is certain that they have no right to complain on account of their lack of being heard. They have entered their appearance and are in court and have been heard continually and continously. In fact, they are the only persons who have been heard. The entire time of the court and commissioner overruled the objections of the appellants, without hearing the petitioners, he referred the matter to the chancellor, and when the chancellor sustained the commissioner's report and was

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about to give the petitioners a hearing, the appellants appealed to this court.

The chancellor designated a date satisfactory to him and the clerk accepted that date and gave the notice accordingly, and the objectors and their counsel have responded to that notice.

The statute expressly recites that the matter shall be heard before the chancery court, or the chancellor in vacation. In nearly every paragraph the statute speaks of the "board of supervisors or the chancellor," and section 1 of both the Acts of 1912 and 1914 expressly provides "whenever the words 'board of supervisors,'" and section 34 of the Act of 1912, provides that all hearings provided to be heard before the chancellor may be heard before a special commissioner who may be appointed by the chancellor.

We, therefore, submit that there is no merit in the objections that the hearing was in vacation or by the commissioner. The objections to the competency of the commissioner himself, we submit, are wholly without merit, as the commissioner is shown to be disinterested. The objection stated seems to be that because of his knowledge of, and experience with the drainage laws, he is competent, rather than incompetent.

It is evident that the legislature did not intend that the rejection of a petition for the establishment of a drainage district should preclude the subsequent establishment of such district, or settle the question for all time to come. In fact the legislature has expressly provided otherwise. The statutes, section 4 of the Acts of 1912 and 1914, in the last paragraph both provide that in any proceeding heretofore or hereafter had for the establishment of a drainage district where the plan has been abandoned and the proceedings dismissed, and afterwards proceedings are instituted for the establishment of a district to reclaim the same territory, or a part thereof, the engineer's reports, surveys, stakes

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and monuments made in the former proceedings may be used and paid for in the subsequent proceeding.

It is evident that the proceeding for the organization of a drainage district and the establishment of ditches and drains is in the same category as a proceeding to establish a road or highway. "The rejection of a petition for a road is no bar to another application for the same road." 27 Cyc., page 127; 23 Cyc., page 1244, note 99.

"Apart from the statute the refusal or dismissal of an application for the establishment of a highway will not bar a subsequent proceeding to establish one over the same route, especially if the necessity of the road is different in the two proceedings. 15 Am. & Eng. Enc. Law (2 Ed.), page 389, sec. 14. To the same effect see 25 Cent. Digest, page 1419: "Refusal of road as bar to subsequent application."

At the time the decree of the chancery court of Holmes county in the matter of the organization of the drainage district which appears in the record, was rendered, the war with Germany was being waged; the life of the nation and the liberties of the people were being defended; all works of a public nature and sale of all bonds, except bonds for the national defense, were inhibited. Under these circumstances, it was natural that the chancellor concluded that it was not for the best interests of the public that a drainage district should be organized at that time.

Since then the war has ended, and bonds are being sold and, moreover, the damage and loss by floods and overflow to the petitioners and the territory involved has greatly increased. What was then not for the public interest may now be a public necessity. At any rate, the petitioners are entitled to be heard, and are not precluded from being heard by the decree in said matter rendered by chancellor Woodward in May, 1918.

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In this decree the chancellor directs that all maps, plats, engineer's reports and surveys and other proceedings in said matter be preserved for future use as provided bysection 4, of chapter 269, of the Laws of 1914. So that it is evident that the chancellor did not intend to forever bar the petitioners or the landowners of the territory affected, from relief as prayed for. Since then times and conditions have changed, many of the lands have changed owners, business has revived, the price of cotton has increased and the value of lands affected has more than doubled in value.

We are aware of the fact that the appellants have no right to be heard in this court and that this appeal should be dismissed and this cause remanded to the chancery court of Leflore county for further proceedings until a decree is rendered from which an appeal will lie as held in *Drainage District* v. *Papenee Plantation Co.*, 118 Miss. 493, and *Clark* v. *Strong*, 81 So. 643, but as such action would serve only to delay the cause and would leave the questions raised by these objectors undecided and all to be argued and insisted upon again, we have refrained from making a motion to dismiss the appeal, hoping that these questions may be finally decided and eliminated from the proceeding.

We therefore, respectfully submit that all of the decisions and actions of the chancellor and commissioner in this proceeding should be affirmed and this cause remanded to the lower court for further proceedings toward the establishment of the district as prayed for.

STEVENS, J., delivered the opinion of the court.

Acting under chapter 195, Laws of 1912, as amended by chapters 269 and 271, Laws of 1914, the appellees filed their petition in the chancery court of Leflore county, praying for the organization of a drainage district comprising certain lands in Leflore, Holmes, and

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Carroll counties, and to be known as the "Abiaca drainage district" of said counties. Upon this petition the chancellor directed the clerk to give notive by publication to all parties interested, and the publication was made in the three counties named. Ten persons claiming to own lands in the proposed district appeared as objectors, and by a pleading in the nature of an answer to the petition challenged the sufficiency of the petition in law, and, among other things, pleaded that the chancery court of Leflore county is without jurisdiction of this proceeding, for the reason, as alleged, that the same petitioners heretofore exhibited their petition to the chancery court of Holmes county, praying for the organization of a drainage district to be composed of approximately the same territory here to be incorporated into a district; that the chancery court of Holmes county upon due consideration entered a decree dismissing the petition, and that the final decree entered by the chancery court of Holmes county is a bar to this proceeding in Leflore county. A copy of the pleadings and decree in the Holmes county proceeding is exhibited as a part of the answer. The chancellor appointed C. L. Lomax as special commissioner to hear any controversies arising between the parties, and the commissioner passed upon the plea of *res adjudicata*, and made his report to the chancellor, setting forth his ruling and the reasons therefor, and the chancellor, over the objections of the appellants, confirmed the report of the commissioner, thereupon accepted the resignation of the commissioner, and fixed a day in vacation for further proceedings in this cause, but granted an appeal to appellants "to settle the principles of the cause and to avoid expense and delay."

In the final decree rendered by the chancellor in the Holmes county proceeding is the following provision:

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"It is further ordered that the clerk of this court preserve all maps, plats, engineer's report and surveys and other proceedings had herein, for future use as provided by section 4, chapter 269, Laws of 1914."

And the decree makes provision for the costs incurred in the first proceeding and the collection thereof.

It does not affirmatively appear to us now that at the hearing fixed by the chancellor a protest or objection was interposed signed by a third of the landowners or by a majority of the landowners, but appellants do enter their appearance, and file certain remonstrances. No final disposition had been made of the petition when the commissioner overruled the plea of *res adjudicata* and when the chancellor confirmed and approved this action of the commissioners but it affirmatively appears that a subsequent date was fixed by the chancellor for further proceedings to be had in accordance with the statute. The appeal here prosecuted is therefore an appeal from an interlocutory decree entered by the chancellor in the course of the proceedings.

There are two contentions in reference to jurisdiction: First, want of jurisdiction is predicated upon section 1, chapter 269, Laws of 1914, which provides:

"If land in more than one county is embraced in the proposed district, the application shall be addressed to the chancery court of any county of such district, and all proceedings shall be had in such chancery court."

Secondly, that the decree entered by the chancery court of Holmes county in the first proceeding is such a former adjudication as constitutes an absoute bar to the present proceeding in Leflore county.

The right of appellants to prosecute this appeal is not challenged by motion to dismiss or otherwise. The chancellor expressly granted an appeal, and both parties ask and insist that the point raised and briefed should

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be decided. Without, therefore, passing upon any question as to the right of appellants to appeal from the decree complained of, we proceed to a brief discussion and a decision of the one and only point presented; that is, whether the chancery court of Leflore county had jurisdiction, and whether the plea of *res adjudicata* was properly overruled by the chancellor. No other point could now be decided. The latter part of section 4, chapter 269, Laws of 1914, provides:

"In any proceeding heretofore, or hereafter, had for the establishment of a ditch or drain, or the doing of any other thing deemed necessary when an engineer has been appointed, and has made complete surveys and reports thereof, and for any reason the improvement has been abandoned, and the proceedings dismissed, and afterward proceedings are instituted for the establishment of a ditch or drain or for the doing of anything toward the prosecution of said work, for the reclamation of the same territory surveyed in said former proceedings, or a part thereof, and the territory additional thereto, the engineer's reports, surveys, stakes and monuments made in former proceedings, as far as practicable, or so much thereof as may be applicable, and the cost thereof in said former proceedings, or such parts thereof as used, shall be paid for as a part of the subsequent proceeding in which such report, surveys, stakes and monuments, or a part thereof, are used."

It is the province of the legislature to provide for the establishment of drainage districts and the authority, as well as the procedure, for the creation of the drainage district in this case is governed by the statutes. If the district is to be created out of territory situated in more than one county, the statute provides that the application shall be addressed to the chancery court of either county in which a portion of the lands may be situated, "and all proceedings shall be had

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in such chancery court." This means nothing more than that the proceeding shall be had before the chancery court instead of before the board of supervisors. It does not deprive the chancery court of Leflore county of jurisdiction in this case.

The plea of former adjudication is not well taken. The petitioners have proceeded under the authority of the statute, and proceedings are being taken by the chancery court of Leflore county looking to the permanent creation of a drainage district out of well-defined territory. We do not regard this as a kind of proceeding in which the doctrine of former adjudication can be invoked, in the absence of an express statutory provision to that effect. The statutes under review make no provision for such a plea. On the contrary, the quoted provision of section 4, chapter 269, Laws of 1914, clearly indicate that more than one proceeding may be instituted for the establishment of a ditch or drain under the provisions of the statute. The legislature, in contemplating a subsequent proceeding, expressly provides that the engineer's reports, surveys, stakes, and monuments made in the first proceeding shall be paid for as a part of the costs in a subsequent proceeding. The only judgment which the statute gives the force of the usual judgment at law is the order of the board of supervisors or the chancery court establishing a district. This final order establishing a district is by express provisions of section 3, chapter 269, Laws of 1914, given "all the force of a judgment," and from this order any owner of real property is given the right of appeal. The proceeding being statutory, we must look to the statute for the available grounds of remonstrance. A case in point is that of *Heick* v. *Voight,* 110 Ind. 279, 11 N. E. 306. In that case the answer pleaded an alleged former adjudication, and the supreme court of Indiana, by MITCHELL, J., on this point said:

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"The statute provides definite and particular grounds of remonstrance. Some of the answers presented, as a bar to the proceedings, grounds of objection which are not specified as grounds of remonstrance. The grounds of remonstrance cannot be enlarged by answers filed before a report of the commissioners is made. No provision is made for pleading a former adjudication. It is therefore to be inferred that the legislature did not intend that one failure to secure the drainage petitioned for should bar all future attempts, if the petitioner was willing to run the hazard of paying the costs in case such subsequent efforts failed of success."

The reason for this ruling is apparent. If an order of the board of supervisors or the chancery court dismissing the petition is given all the force of a judgment, it would operate for an indefinite length of time. A mistake might be made or conditions easily change. This is a statutory and administrative matter in which the public has an interest. Surely a technical rule of the common law should not be invoked to defeat a meritorious internal improvement; and the courts should not so hold in the absence of an express statutory provision on the point. It is well that litigation should be ended, and we do not mean to say that a case could not arise indicating a fraudulent repetition of the same proceeding or an imposition upon the court and a possible case of estoppel.

The decree appealed from will be affirmed and the cause remanded for further proceedings.

Affirmed and remanded.

ETHRIDGE, J. (dissenting).

I do not think the court has jurisdiction of the appeal so as to authorize it to decide the cause, and that the appeal should be dismissed by the court of its own motion. The appellees in their brief say:

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"We are aware of the fact that the appellants have no right to be heard in this court, and that this appeal should be dismissed, and this cause remanded to the chancery court of Leflore county for further proceedings until a decree is rendered, from which an appeal will lie as held in *Drainage District* v. *Napenee Plantation Co.*, 118 Miss. 493, 78 So. 709, and *Clark* v. *Strong*, 81 So. 643, but as such action would serve only to delay the cause and would leave the questions raised by these objectors undecided and all to be argued and insisted upon again, we have refrained from making a motion to dismiss the appeal, hoping that these questions may be finally decided and eliminated from the proceeding."

In the case of *Drainage District* v. *Napenee Plantation Co.*, above cited, this court held that no appeal lies from the order of the chancellor complained of and sustained a motion to dismiss the proceeding because no appeal would lie from an order of this kind. In *Clark* v. *Strong*, 81 So. 643, upon motion to dismiss, the court said:

"The statute under which the [drainage] district is being formed does not provide for the appeal here attempted to be taken, and the orders and decrees made in the process of the creation of a drainage district were not within the general statutes regulating appeals from the chancery court."

It is well settled in Mississippi that the right of this court to entertain appeals is dependent upon statute, and where there is no appeal allowed by statute this court has no jurisdiction to entertain an appeal. It is equally well settled in this state that jurisdiction cannot be conferred upon this court by consent so as to give it a right to entertain an appeal not provided for by law. In *Ward* v. *Whitfield*, 64 Miss. 754, 2 So. 493, the court held that where no appeal is provided for by statute and the lower court grants an appeal authorized by law that this court will apply the corrective

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by dismissing of its own motion such appeals.. COOPER, C. J., delivering the opinion of the court, at page 761 of 64 Miss., 2 So. 495, said:

"We would have disposed of these appeals with a simple order of affirmance but for the opportunity afforded by them to again admonish chancellors, that appeals from interlocutory decrees ought not to be granted unless the principles of the case can be settled upon such appeals. In the progress of chancery proceedings very many interlocutory decrees are made, and it is but natural that parties should desire to avail themselves of every opportunity afforded for appeals. But the statute authorizing appeals from such decrees can have application only when the principles governing the cause may be settled by the appeal, or where the chancellor doubts the correctness of his conclusion, and costs and delay may be avoided by the appeal. It is not the purpose of the statute to afford appeals to this court merely because litigants are dissatisfied with such interlocutory decrees; ordinarily, the interests of all parties will be advanced, and justice more speedily and economically administered by proceeding to final decree. Unless the evil of frequent appeals is removed by the action of the lower courts, this court will apply the corrective by dismissing *ex mero motu* appeals improvidently granted."

In *Greve* v. *McGee,* 92 Miss. 190, 45 So. 706, the court of its own motion dismissed an appeal to this court not allowed by the chancellor.

So I say the court of its own motion ought to dismiss the appeal in this case. The opinion rendered by the majority does not hold that the court has jurisdiction by the statute, and the above cases are not overruled, but the court has entertained the appeal as a matter of mere grace and favor to the litigants. If I understand them, the majority reserved the right to dismiss such appeals whenever a motion is made to

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do so, and will consider themselves bound by the cases quoted from the appellee's brief. In my opinion all litigants as to appeals should have equal rights before this court, and appeals should be entertained as of right and not otherwise. In legal effect the opinion of the majority is not an opinion of this court, as such, but is a mere opinion of five learned lawyers who happen to occupy positions in this court. I prefer not to express my own opinion on the merits presented, and it seems to me that the question as to whether the question presented is a judicial question is open to doubt. The creation of a drainage district seems to be a legislative function, and it is doubtful whether the controversy is a judicial one, at least I deem it sufficiently so to have that question determined after argument and investigation in a real suit where the question is presented.

BILES v. WALKER.

[83 South. 411, In Banc. No. 20912.]

1. APPEAL AND ERROR. *Court in determining the correctness of the decree of the lower court will accept the evidence of the successful party.*

   Where there is a conflict in the evidence the supreme court on appeal will acept the evidence of the successful party and determine from that as to whether or not the chancellor's decree will be upheld.

2. VENDOR AND PURCHASER. *Bona-fide purchaser.*

   Under the facts in this case as set out in its opinion the court held that there was sufficient to put the defendant on inquiry and that he was not a bona-fide purchaser for value without notice.

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3. PRINCIPAL AND AGENT. *Knowledge of purchaser's agent as to title is knowledge of purchaser.*

Notice or knowledge by an agent who is examining the title or making a purchase for a principal acquired at such time, is notice to and equivalent to knowledge by such buyer.

4. ESTOPPEL. *Giving agent apparent title to property not to be urged by purchaser with knowledge.*

The rule that equity will not relieve the principal who has voluntarily placed the title to his land in his agent, where another must suffer by reason of such fraudulent act does not apply where the purchaser had knowledge of all the facts, or sufficient facts which, if followed up, would place him in possession of all the facts as to the real ownership of land.

5. ESTOPPEL. *That purchaser took land in name of agent in order to sell more readily for better price not in itself fraudulent.*

The fact that a real estate agent took the title to purchased land in the name of his agent solely for the reason that he could more readily sell the property, or sell it at a better price than if in his own name, was not in itself unlawful, or fraudulent.

APPEAL from the chancery court of Bolivar county.

HON. JOE MAY, Chancellor.

Suit by U. S. Biles against E. Y. Walker. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

McGehee, Livingston & Farrabough and *Wilson & Armstrong,* for appellant.

J. B. Harris, for appellee.

ETHRIDGE J., delivered the opinion of the court.

Biles filed suit in the chancery court against E. Y. Walker to cancel a claim of E. Y. Walker to certain lands deeded to the appellee by one West, the former employee of Biles, conveying a half section of land worth approximately twelve thousand dollars for the sum of two thousand dollars and the assumption of a mortgage outstanding against the lands for two thou-

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sand, five hundred dollars. The bill alleged that the property belonged to Biles, and that the title had been vested in Wilroy as an employee and agent of Biles, and that the property had been conveyed to West, another agent and employee of Biles, and that after West quit the employment of Biles the property was reconveyed to Biles by West, but the deed was not placed of record, but complainant was under the impression that it was of record until recently, and after said conveyance by West to Biles, West attempted to convey the property to E. Y. Walker, the appellee; that the pretended deed from West to Walker was dated the 6th day of July, 1918, and that West well knew that he had no title, and it further charges that Walker knew that West had no title, and was acquainted with the fraud attempted to be practiced upon Biles by West, and alleged that the said deed from West to Biles, reconveying the property, was lost; afterward this unrecorded deed from West to Walker was found, and an amended bill was filed, to which the deed was made an exhibit. Walker filed an answer, denying any knowledge of Biles' title, setting up good faith on her part in said transaction. The contract between Walker and West was made in July at which time Walker sent a check for one hundred dollars to West, which check was paid subsequent to the filing of the suit and *lis pendens* notice, but prior to service of process. After service of process further payment of $100 was made to West by Walker, but a deed was entered into, dated and acknowledged on the 6th day of July, 1918, acknowledged before a notary public of Warren county, and filed for record on the 9th day of July, 1918. The chancellor decreed for the defendant, and the question before us for decision is whether the facts warranted the chancellor's decree. As there was some conflict in the evidence, we must accept the evidence of the defendant,

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and determine from that whether or not the chancellor's decree must be upheld.

It appears that J. C. Walker, the husband of E. Y. Walker, conducted all the negotiations with West and made the payments for E. Y. Walker and examined the records, acting for her in the premises prior to the filing of the suit. It appears from the evidence of J. C. Walker that he made an examination of the records to determine the title before buying the land, and in this examination he saw the deed of trust executed by Biles to the National Insurance Company, which had been recorded, in which deed of trust Biles was conveying the land in suit to secure an alleged debt due the insurance company. It further appears that Walker had a conversation with West over the telephone in reference to the deal between West and Walker, in which West stated that he was anxious to sell the property, as he needed the money, and that he feared that Biles would tie the property in the chancery court. It further appears that Walker had knowledge of another transaction, relating to other land between West on one side and Biles and the bank on the other, in which the bank's interest was derived through Biles, which suit was compromised. It further appears that Walker knew that West had formerly been employed by Biles, and that this last suit grew out of a similar transaction, in which West had sold certain land near Shaw, Miss. It further appears that West had been in financial trouble after his severance of his relations with Biles, and this was known to Walker. It will be noted that Walker had sold the property for forty dollars an acre, amounting to about twelve thousand dollars, and that the land in reality was worth that much, whereas he bought the land from West under the circumstances related for approximately one-third of its real value. Taking all these facts together, we think they were sufficient to cause a reasonably prudent man to halt

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and investigate before going further, and under the circumstances the defendant was not a *bona-fide* purchaser for value without notice. *Stovall* v. *Judah,* 74 Miss. 747, 21 So. 614; *Rowan* v. *Adams,* Smedes & M. Ch. 45.

Notice or knowledge by an agent who is examining the title or making a purchase for a principal, acquired at such a time or while he is investigating the title, is notice to and equivalent to knowledge by such buyer. *Edwards* v. *Hillier,* 70 Miss. 803, 13 So. 692; *Ross* v. *Houston,* 25 Miss. 591, 58 Am. Dec. 231; *Baldwin* v. *Anderson,* 103 Miss. 462, 60 So. 580; *Buck* v. *Paine,* 50 Miss. 648; *Parker* v. *Foy et al.,* 43 Miss. 260, 5 Am. Rep. 484.

It is contended by the appellee that the fact that Biles had the property conveyed to his agent instead of to himself is such an act on his part as constitutes a fraud upon the purchaser, and that equity will not relieve a person who has voluntarily placed his title in a third person where a fourth person must suffer loss by reason of his act, and rely upon Pomeroy's Equity Jurisprudence, vol. 2, section 278, 16 Cyc. 773, 10 R. C. L. 788, section 102, and various other authorities to support the contention of the appellee. Whenever a person for fraudulent purposes places the title of his property with a third person, or does an affirmative act for the purpose of misleading, or places it for the purpose of concealing it from his creditors, the doctrine would apply, but it would not apply in a case like the present one, where the buyer had knowledge of all facts or of sufficient facts which, if followed up, would place him in possession of all the facts. Equity will not grant relief to a person who is guilty of fraud in any part of a transaction involved in a suit, but the only evidence in the record before us of a reason for placing title as it was placed is that Biles could more readily sell the property, or could secure a better price

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for the property than he could if it was in his own name. This is not unlawful, or fraudulent, within itself, and it is clear from the whole record that Walker is not an innocent purchaser, but, on the contrary, had sufficient facts to convince a reasonably prudent person that there was some right to this property in Biles.

The judgment of the lower court must be reversed, and the cause remanded, with directions to grant the relief prayed for.

Reversed and remanded.

SYKES, J., being disqualified, took no part in the decision of this case.

INTERNATIONAL SHIPBUILDING CO. v. CARTER.

[83 South. 413, In Banc. No. 20844.]

MASTER AND SERVANT. *Safe place rule.*

The rule which requires the master to furnish a safe place to work does not apply to cases where the prosecution of the work itself makes the place and creates the danger.

APPEAL from the circuit court of Jackson county.

HON. J. H. NEVILLE, Judge.

Suit by S. H. Carter against the International Shipbuilding Company. From a judgment for plaintiff. Defendant appeals.

The facts are fully stated in the opinion of the court.

McDonald & Marshall, for appellant.

We submit that appellee could not declare upon one theory or ground of action, and recover upon another. He must recover if at all upon the theory or ground of

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action relied upon in his declaration. To permit him to do otherwise would be contrary to law, and would be grossly unfair to appellant. *Richards* v. *City Lumber Company,* 57 So. 97.

There being nothing wrong or negligent in the place of plaintiff's work at the time of the accident, and his place of work being in no legal sense a cause of his injury, the giving of instruction number one for appellee, above set out, has been distinctly condemned and held reversible error by this court in *New Orleans and Northeastern Railroad Company* v. *Williams,* 96 Miss. 373, 53 So. 619.

The "safe place in which to work" doctrine has no applicability to this case, and was not a criterion of liability. Hence the granting of this instruction was prejudicial and reversible error. And so, we submit, with the refusal of the learned court below to grant instruction number five, above set out, requested by appellant in an effort to cure the submission to the jury of this false criterion of liability by the granting of instruction number one for appellee. We are at a loss to conceive of a basis of legal justification for the refusal to grant this charge; or how such refusal could have failed to materially prejudice appellant's right to a fair trial. It was founded upon the testimony, was pertinent to the issue raised upon count one of the declaration and submitted to the jury by the court's refusal to grant appellant's request for a peremptory instruction upon that count; was in direct answer, or at least, supplementary in a necessary way, to instruction number one granted for appellee; and beyond question embodied a correct announcement of the law governing a trial of the issue, if the learned court properly submitted to the jury the issue raised on count one of the declaration.

Further, we submit, beyond the fact that plaintiff's place of work did not in law cause, or contribute to

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the occurrence of the accident, the safe place in which to work doctrine could not be applicable as a criterion of liability to this cause. Appellee being engaged in construction work, and the place of work being created by the work itself performed by appellee and his co-laborers, and changing and shifting constantly safe one moment, unsafe the next, as the construction progressed, the doctrine could not be applied. In such case appellee and his co-workers and not appellant, furnished the place of work, they being employed to create that very place. 18 Ruling Case Law, Master and Servant, paragraph 18.

"An exception to the rule requiring the employer to make safe the place is which his employees are at work is said to exist where the conditions of the place are constantly changing as the work progresses." 3 Labatt on Master and Servant, paragraph 1177.

"The rule that it is the duty of a master to provide a reasonably safe place to work for his servants is held not applicable to cases in which the very work at which the servants are employed is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety." *Citreon* v. *O'Rourke Engineering Construction Co.*, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; *Walters* v. *Sumerfield Co.*, 160 Iowa, 127, 140 N. W. 388; *Jakopac* v. *Summerville Co.*, 153 Wis. 176, 140 N. W. 1060; *Meehan* v. *St. Louis, etc., R. R. Co.*, 114 Mo. App. 396, 90 S. W 102; *Zeigenmeyer* v. *Charles Goertz Lime and Cement Co.*, 113 Mo. App. 330, 88 S. W. 139; *Utica Hydraulic Cement Co.* v. *Whalen*, 11 Ill. App. 23.

The rule which requires a master to furnish a safe place to work does not apply to that class of cases where the work which the servant is employed to do is constantly producing changes and temporary conditions, for the time being more or less hazardous for

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those engaged in the work, and where it would be practically impossible to keep the conditions safe and prosecute the work. *Lassasso* v. *Jones Brothers Co.*, 88 Vt. 526, 93 Atl. 266; *Shields* v. *Bergendahl Bass Engineering Contruction Co.*, 187 Ill. App. 5; *Horton & Horton* v. *Hartley* (Tex.), 170 S. W. 1046; *Morgan* v. *Wabash Railroad Co.*, 158 Ill. App. 344; *Callen* v. *Bull*, 113 Cal. 593, 45 Pac. 1017; *O'Connell* v. *Clark*, 48 N. Y. Supp. 74, 22 App. Div. 466.

"The principle of a safe place does not apply where the prosecution of the work itself makes the place and creates the danger." *Miller* v. *Moran Brothers Company*, 39 Wash. 631, 81 Pac. 1080, 109 Am. St. Rep. 917, 1 L. R. A. (N. S.) 283.

We respectfully submit, therefore, that the learned court below inadvertently committed error gravely prejudicial to appellant in refusing to grant appellant the requested peremptory instruction upon count one of appellee's declaration; in giving instruction number one requested by appellee, and in refusing to give instructions four and five requested by appellant, and that, accordingly the judgment appealed from should be reversed.

White & Ford, for appellee.

The case went to the jury on the court declaring it an unsafe place to work and the action of appellant in failing to furnish a sufficient number of reasonably safe tools. The court gave a peremptory instruction charging a failure to furnish a sufficient number of men, but why, we do not see, as there was a direct conflict in the evidence on that point.

Appellant pleaded only the general issue. The defenses of contributory negligence, and negligence of fellow servants are affirmative defenses which must be pleaded and such pleas must state facts showing such defenses.

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The defendant is entitled to know what acts are relied on to constitute contributory negligence and negligence of fellow servants, so, if necessary issue can be joined thereon. The bare statement without more that appellee was guilty of contributory negligence and that his fellow servants were guilty of negligence will not do. But no such defenses were shown so the failure to plead same are immaterial. Certainly the allegations of the declaration were proven by appellee's witnesses and also appellant's witnesses.

So to take up appellants brief seriatim. He contends we sued on one theory and recovered on another. He does not state wherein this fact exists. We rely on the declaration which the proof overwhelmingly supports.

The counsel cite *Richards* v. *Lumber Co.*, 57 So. (Miss.), 977, 101 Miss. 678, which absolutely states the law of that case. The negligence charged was worn out and defective machinery which placed too much strain on a belt which broke. There was no proof of such fact but the proof was that some person let the machinery choke and clog which placed so much strain on the belt, new belt, so far as the evidence shows, that it broke. There was no count declaring any negligence in allowing the machine to choke and the proof showed the choking was the sole cause of the injury. The cause failed for total lack of proof.

Counsel criticise instruction No. 1, granted appellee. If appellee was entitled to go to the jury on the first count which cannot be seriously controverted, then this instruction was eminently proper. Counsel cite *Railway* v. *Williams*, 96 Miss. 373. In the Williams case the negligence charged was a failure to furnish a safe place to work, the employee being engaged in carrying a heavy object between two cars for aught that appears, this being the only trip he would make between the two cars and while so doing the cars were switched

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on him. The court said the negligence in switching the cars should have been charged.

In the case at bar, count one charged that the place became unsafe by reason of the bringing into the ship of the heavy timber and throwing it on appelee without warning while he was confined in a narrow space. Appellant complains of the refusal of his instruction No 5. The instruction ignores that the finding must be from the evidence. It ignores the fact that the duty to furnish a safe place is nondelegable and it ignores the evidence that the heavy timber was brought in and pushed on appellee, confining itself to the original situation. There are numerous other instructions in the record for both parties covering all phases of the case.

We recognize the rule in this state that where the work is constantly changing as the work progresses, the servant assumes the risk of that employment, as recognized by this court in *Cybur Lumber Co.* v. *Erkhard,* 118 Miss. 401, which appellant does not cite, but such a case is not presented by this record and the authorities cited by counsel are not in point. Appellant didn't even plead such a defense. By his plea he only denied that the place was unsafe. The negligence here complained of was not a thing constantly changing. The bringing of the heavy timber in to the vessel was an occasion out of the ordinary. That was only one of the duties of appellee. Appellant put him in a trap to work and then without warning or time to escape wilfully shoved a timber weighing many tons on him.

The progress of the work did not mean that while appellee was working with his back to the dolly that another piece should be thrown off on him; nor did the exigencies of the occasion require it. If Carter had been injured in the orderly progress of the work, and by the timber while on the dolly and without negligence,

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then a different question would be presented to the court, but appellant cannot say "yes, my foreman, whose duty it was to warn Carter of the very thing and whose duty it was to give the order for the timber to be thrown off, was in a hurry so threw it off on Carter" and then contend this was a part of the progress of the work. Where the work progressed improperly the principle and the rule does not apply. The work itself did not make or create the danger, but the method pursued and the place furnished appellee created the danger and caused the damage.

We are familiar with the case of *Miller* v. *Moran,* 1 L. R. A. (N. S.) 283, cited in brief and approve its reasoning. In that case there was no necessity for the employee to be where he was when injured (standing under a weight of two thousand pounds which was being hoisted and which fell on him) and the court said the accident was due to the fault of no one. The injured party was not put to work in the place at all. We do not take up all of appellant's cases because we submit the principle enunciated is not involved here. Counsel say that the rule contended for applies because there is "absolutely no criticism of appellant's method, system, or rules of work, nor of the place he happened to be in. We certainly do criticise the method, system and rules of work and the place, not that he "happened" to be in, but the place he had to be in.

In the case of *Coast Ship Company* v. *Yeager,* 81 So. (Miss.) 797, decided by this court May 19, 1919, through Mr. Justice STEVENS, the same able counsel representing appellant in this case represented the Ship Company in that case. In the Yeager case the claim was that the injury was due to the failure of the Steamship Company to furnish Yeager a safe place to work in that holes were bored from the outside of the ship and the auger struck the foot of Yeager on the inside. Counsel contended that as the place of work

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constantly underwent changes as the construction progressed (the same contention here made) there was no liability, but the supreme court said there was liability. Certainly the case at bar is a far stronger case than the Yeager case, because here there was a foreman present to give the warning and he wilfully had the timber thrown on Carter when Carter had his back to the timber and he was in a narrow place where Zink (the foreman) was bound to see he would be struck. This case falls squarely within the rule laid down in *Edwards* v. *Lumber Company,* 113 Miss. 378.

In that case the machinery was started too soon, the man starting it, a fellow servant of the injured party, not knowing he was in danger. In the case at bar the foreman gave the order to set the dangerous agency in operation, knowing Carter was bound to be injured. The place Carter was in was not made unsafe because of the orderly progress of the work, but because of the almost criminal negligence of the appellant.

The case of *Benton* v. *Hinkbine Lumber Company,* 118 Miss. 558, would more nearly approach the doctrine contended for by appellant, than this case, but still this court has held even under a state of facts such as existed in the Benton case, that liability exists. See, also, *Oil Co.* v. *Ellis,* 72 Miss. 191. Generally, see *A. & V. R. R.* v. *Groome,* 52 Miss. 793; *Railroad* v. *Hardy,* 88 Miss. 732; *Railroad* v. *Bailey,* 40 Miss. 395.

It is doubtful if willful and wanton injury can be charged and simple negligence proven, and still a recovery be had; but in this case simple negligence was charged and gross, willful and inexcusable negligence shown by appellant's own testimony and the admission of its own foreman who was guilty of such. Therefore appellant is guilty of more than it is charged with and cannot complain.

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COOK, P. J., delivered the opinion of the court.

Not being up in nautical terms and having never seen the hold of a ship, the writer avails himself of the brief of counsel for a statement of the facts, which statement has been verified from the record:

"In January, 1918, appellant was operating a shipbuilding plant in Jackson county, Miss., and there had in progress of construction several large wooden seagoing vessels. In the partially built hull of one of these vessels appellee was employed by appellant to work in the construction as a member of a crew of laborers aiding the regular ship carpenters. The crew of which appellee was a member was under the general supervision and command of a foreman, who deputized one of the crew as straw boss, or leader, when he was temporarily absent from the personal supervision attending to other duties.

"The work of the crew of laborers shifted from one part of the large structure to the other as the varying exigencies of construction arose. The natural hazards of the work grew out of the work's progress, and changed and shifted with its progress. Nothing was unusual or wrong about the work, or in the system, method, or rules under which it was being performed.

"On the date in question, the work required that a piece of timber about one foot square, and approximately forty feet long, be conveyed from near the after part of the hull under construction and placed with other similar pieces on the right-hand side of the keel near the bow. The piece was successfully rolled upon a device commonly known as a 'dolly,' opposite the point at which it was to be deposited with the other piece upon the floor of the ship. Appellee was a member of the crew of some eight or ten other men performing the work. Several cant hooks, or peevies, were being used by the men to roll the piece on the 'dolly,'

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and then adjust it properly with the other pieces upon the floor of the ship. Mr. Baxter, the crew leader, himself a laborer, and a member of the crew, directed the men to perform this particular work.

"The proper method for the men to perform the work, and the method then adopted by them, was to stand all on one side of the timber and roll it from them. The points of the peeves are imbedded in the piece, and with the leverage thus afforded the workmen heave upwards on the handle, giving the piece a tendency to roll from them. When the point of balance is passed, the piece rolls over, and the peevy points naturally withdraw themselves. When the center of gravity, or point of balance, is passed by the timber, the men have no control over it, the peevy points withdrawing themselves, and the timber falling forward, regardless of the number or condition of the peevies being used. Should the peevies fail to hold before the point of balance is reached, the piece will roll backwards, on the 'dolly,' and towards the men. After the point of balance is passed no number of peevies can prevent the forward roll of the timber, as the points, as they are meant to do, naturally loosen themselves.

"As the men were performing the work, appellee, for some reason, went in front of the piece on the 'dolly,' standing opposite the place where the piece was to be deposited. All the other men remained in their proper positions behind the piece, to roll it from them. Appellee said that some one—he was totally unable to say who, there being eight or ten men present—suggested that he go in front of the piece to adjust another piece. No other witness heard that. While appellee was in front of the piece on the 'dolly,' the rest of the crew remaining on the other and proper side of the piece, the piece either fell off, or was rolled off, the 'dolly,' striking the appellee's foot, and inflicting upon him the injuries complained of by him in this cause.

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"The witnesses to the occurrence gave varying accounts of the occurrence. Appellee himself had no idea why the piece rolled; he merely heard some one shout "Look out" before he was struck. Baxter, the crew leader, said that the piece fell off the 'dolly,' but was utterly unable to say why it fell' or why appellee went in front of it. Joe Bosarg, witness for appellee, said that there was plenty of men at work, with adequate peevies, and that appellee pried the piece off the 'dolly' onto his foot, and that some of the crew 'reniged.' None of the witnesses for appellee knew why the piece fell or rolled towards appellee."

A number of instructions were given for both the plaintiff and defendant. Instruction No. 1, given by the court at the request of plaintiff, is in these words:

"The court instructs the jury, for the plaintiff, that the International Shipbuilding Company owed plaintiff and his coemployees the duty to furnish them a reasonably safe place within which to work, and if the jury believes from the evidence that defendant failed to furnish such reasonably safe place within which the plaintiff might perform the work assigned to him, and the jury further believe that as the proximate result or consequence of such negligence, if any, in so failing to furnish a reasonably safe place in which to work, the jury should find for the plaintiff."

Appellant insists that the giving of this instruction, under the facts of this case, was error. We think that the rule which requires the master to furnish a safe place to work does not apply to cases where the prosecution of the work itself makes the place and creates the danger. The prosecution of the work in the instant case necessarily changed the place to work as the work progressed, and these changes often increased the hazard. The supreme court of Washington, in *Miller* v. *Moran Bros.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A.

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(N. S.) 283, 109 Am. St. Rep. 917, stated the rule in these words:

"The very nature of the work of building a ship necessitates constant changes. A place perfectly safe one minute may become extremely dangerous the next by the ordinary and necessary operation of the work, and without fault on the part of any one. A servant working in the capacity of this appellant knows all this, and must be held to be, to a certain extent, his own inspector. He cannot complain because the master, with less opportunity than he [to avoid the accident], has failed . . . to detect or anticipate an unexpected occurrence."

This court recognized this rule in *Railroad Co.* v. *Williams,* 96 Miss. 373, 53 So. 619. Instruction No. 1 was fatal error and the judgment is reversed.

Reversed and remanded.

MERIDIAN LIGHT & RY. CO. v. STEELE.

[83 South. 414, In Banc. No. 20864.]

1. ELECTRICITY. *Contract for payment of arrearages. Void.*

A provision in a contract between an electric light company and a customer by which the customer is required to pay before installation of service, a previously contracted bill for services at another location, is without consideration and void.

2. ELECTRICITY. *Electric light company liable for damages for delay in furnishing service.*

An electric light company is liable for actual damages for its delay in furnishing service to a customer because the customer refused to pay for arrearage on account of service at a former residence.

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APPEAL from the circuit court of Lauderdale county. HON. R. W. HEIDELBERG, Judge.

Suit by Gertrude Steele against the Meridian Light & R. R. Co. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Baskin & Wilbourn, for appellant.

This case resolves itself simply into a proposition which we think may fairly be stated as follows: Miss Steele applied for service and made a deposit on May 6, 1918. The company found a balance against her on its books for past due service amounting to six dollars and twenty-eight cents and politely desired and requested that this be adjusted before the application for service was granted and the connection actually made.

Miss Steele did not think she owed the amount and asked for a statement and begun to look up her checks and receipts. Reading the discussion over the liability of the account the expected guest, for whose benefit the lights were desired, gave notice of the exact time of his arrival. Miss Steele's attorney requested the appellant to cut in the light and let the matter of the account be adjusted afterwards. To this the appellant assented and cut in the lights in time for the guest, and appellee has had the benefit of the lights ever since, and has not paid the said balance.

She had been without the lights from voluntary choice for a number of months, and got the lights in time for the special purpose for which they were ordered, and such loss of time as she endured in looking up the accounts was all due to the company's presentation of the bill against her for six dollars and twenty-eight cents and was only such time as she would have spent in looking the matter up had there been no ques-

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tion whatever between her and the appellant as to the cutting in of the lights.

The bill was presented in good faith, and under the honest belief that Miss. Steele owed it; and if the Company is to be penalized with punitive damages or mulcted for any kind of damages because it had the temerity to make polite request for the payment of a bill, then it seems to us there is something vitally wrong in our condition of life. We do not believe that any court on earth ever has or ever will hold that a party who presents an account which he thinks another one owes him, but which in point of fact the other may not have owed him, or may dispute, is liable for damages for the loss of time that the party against whom the account has been presented has sustained in looking up the receipts and checking the account and investigating the question of liability. Nor does it seem to us to comport with justice, nor be in the interest of public policy to permit a recovery for the worry that one gives oneself over the fact that another has in good faith presented for payment an account which the party thinks is not due. A great many of our worries are self imposed. Whether or not one worries over a thing is largely dependent upon oneself.

It does seem to us that a public service corporation has the right to demand payment of an account that it honestly believes is due it, as in this case, and that a sound public policy should protect them in that right. Their property is impressed with a public service. The courts have declared that they are entitled to a fair return on the investment. The result is that performance of the public service must result in enough remuneration to give a fair return upon the investment.

If the company cannot collect its bills because intimidated, and handicapped by the risk of liability to those who may be worried by the presentation of a bill they do not think they owe, then the general public is

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damaged by the increased loss in accounts because the public is called on under the law for enough revenues to meet the increased cost and expense of rendering the public service.

Under all the circumstances, we submit, therefore, that the appellant at least had the right to hold up cutting in of the lights until it could have some reasonable understanding about the past due account, and that as soon as the attorney for the appellee made the request that the lights should be cut in for the particular guest, and stated that the matter of the account could be adjusted afterwards, the appellant did cut in the lights. What we have said has been without reference to the terms of the application for the service.

We now desire to call the attention of the court sharply to the agreement contained in the application for the service, and to submit to the court that on the facts that we have heretofore stated, and upon the terms of the agreement, the appellant was within its rights in the premises and violated no right of the appellee, and is not liable to the appellee in any manner, because of what it did in the instant case.

The particular provision in the application for the service to which we refer is as follows: "I further agree that if I am in arrears with the company for gas or electric service furnished or for pipes, wiring or appliances furnished at the above designated place, or at any other place, or if any member of my household is in arrears, which arrearage accrued while he was such a member of my household, the company shall render me a bill for such arrearage, and if I fail or refuse to pay same on demand; or if I should fail or refuse to comply with any of the foregoing conditions, then the company may remove the meter, sever all connections, either gas or electric, and discontinue the service."

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The foregoing agreement was made beyond dispute. The parties are *sui juris* and the contract is not against public policy; is reasonable and in furtherance of the soundest public policy. Common sense and fair dealing between man and man and the very spirit of the agreement itself, which we have quoted, we submit, made it proper and incumbent upon the appellant to raise the question of the arrearage before cutting in the service.

We would like for the court to pass upon the rights of the appellant under this contract as applied to the facts of this case, because if this particular application for service furnishes no protection in this kind of case to the appellant, and is not reasonable, then the appellant would wish to abandon the use of such application.

If the particular application in question is a valid one, and is reasonable, and lawful, it would be to the interest of the appellant and its customers to have this judicially determined. It is equally important that its invalidity should be judicially declared if it is invalid.

The question is squarely raised by refusal of the court below to grant the appellant instruction No. 7 on page 124 of the record, which we quote, s follows: "The court instructs the jury for the defendant, the Meridian Light & Railway Company, that under the law and the facts in this case, the defendant had the right to decline to cut in the lights upon the application of Miss Gertrude Steele at 1627 Fifteenth Street until Miss Steele should have paid any amount that she was justly due said company, and in arrears with said company, for gas or electric service furnished to her at her address at 14th Street, and if the jury believe from all of the evidence in the case that the defendant, in good faith, believed that the said Miss Gertrude Steele was indebted to it for service previously rendered at the address on 14th Street and in good faith declined to cut in the service at first until said balance was adjusted, and that pending the discussion of this mat-

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ter on request of the attorney for the plaintiff, the Meridian Light & Railway Company, without waiting for actual payment or actual adjustment of the balance claimed cut the lights in, leaving the matter of the disputed bill to be adjusted later, and that the plaintiff was, in point of fact, actually indebted to the defendant in some amount, which was unpaid at the time of her application, then the jury should return a verdict for the defendant. It further raised by the court's instruction No. 1. granted for the appellee, page 108 of record: "The court instructs the jury for the plaintiff that although they may believe from the evidence that the plaintiff (Miss Steele) did owe the defendant a previous balance on another and different contract at another and different house, yet the defendant had no right, after accepting the deposit and agreeing to turn on the electric lights, to unreasonably delay the installation of electrical service; and if you believe from a preponderance of the evidence that the defendant willfully and with a wanton disregard for the rights of this plaintiff, and for the deliberate purpose of coercing payment of an old account that was in dispute, refused to furnish to her electrical service, than you will find for the plaintiff and may assess the defendant with such sum as may seem to you sufficient, taking into consideration the wealth of the defendant, the wrong done and all the other facts in evidence, but in no case to exceed the amount sued for." Which instruction, we submit, is erroneous especially in charging that the appellant had no right to delay the installation of the electric service although the jury might believe from the evidence that the appellee did owe the appellant a previous balance. See especially case of *Mackin* v. *Portland Gas Co.* 4 L. R. A. (N. S.) 596, where it is held as follows: "A rule of a gas company, consented to by the consumer, that it will cease to furnish gas when a consumer becomes delinquent in paying bills

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therefor may be enforced by discontinuing the gas supply at one set of premises until payment of a delinquent bill for gas previously furnished the consumer at another set." We also, *State* v. *Board of Water & Light Commissions of Duluth,* 105 Miss. 472, 117 N. W. 827, 127 A. S. R. 581; *Burke* v. *City of Water Valley,* 87 Miss. 732, is not applicable here. In the Burke case the effort was to refuse the water to an application on account of a delinquency of a former occupant of the building not for a balance due by the applicant himself. No such contract and rule and regulation as is involved in the case at bar, was before the court in the Burke Case.

Nor is this case like the case of *Telegraph Co.* v. *Hobart,* 89 Miss. 252. This case is entirely different from the Hobart case by reason of the fact that there was a specific contract hereinabove quoted, which established and gave the right to the defendant, as we submit to do what it did do in this case. The court did not consider the effect of the contract such as is involved in this case, in either the Burke case or the Hobart. Furthermore there was no cutting out in the present instance at all.

We believe that the court will find that in none of the cases from Mississippi has the particular contract involved hereinabove quoted ever been before the court for solution under this record, and we respectfully submit that under this record the court below erred in its interpretation of the contract and in the instructions granted the plaintiff in all to the prejudice of this appellant.

We further submit that the court erred in submitting the question of punitive damages to the jury. On page 143 of the record it will appear that the court refused an instruction to the appellant directing the jury not to award punitive damages, and the court then did submit the question of punitive damages to the jury.

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Since the verdict of the jury was only for one hundred dollars, it may be contended that the error of the court in refusing to direct the jury not to award punitive damages was cured by the smallness of the verdict.

In answer to this, however, we submit that the facts did not justify a verdict of one hundred dollars actual damages, and that the verdict of one hundred dollars must be held to have resulted in a large part, at least, if not entirely, from the punitive damages instruction. In other words, unless the question of punitive damages had been submitted to the jury, we submit that it is apparent from the record that no such verdict as one hundred dollars would have been rendered in this case; and that if error in submitting the question of punitive damages the case should be reversed.

We further submit that the court erred in refusing refused instruction No. 5, asked by the appellant and refused by the court, found on page 143 of the record. For the reasons hereinabove set forth, we respectfully ask the court to reverse this case, and render judgment here in favor of the appellant. Or, if the court does not think the appellant is entitled to the judgment in this court on this record, then that the case be reversed and remanded for a new trial.

F. K. Ethridge, for appellee.

The courts of the land were established for the purpose of settling disputes of just this nature, and if we are to allow a corporation that serves the public to use such tactics and such means to enforce the collection of accounts which are disputed, then we are at the mercy of just such corporations and the public generally will be the sufferers; such actions are against public policy, unreasonable and unwarranted in law.

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There was no contention on the part of the appellant that it could not at any time have brought suit, and had the justice or injustice of their claim determined by the courts of competent jurisdiction, and if Miss Steele had owed the Meridian Light and Railway Company one penny they could have enforced their demand through the proper channel. To allow a public service corporation to arbitrarily refuse to sell a consumer, deal with the consumer until a disputed account is arranged would be placing in their hands a dangerous instrumentality. As said by the supreme court of Maine in the case of *Woods* v. *City of Auburn,* in the 29th L. R. A., page 377: "The parties are not upon equal grounds. The city, as water company, cannot do as it will with its water. The consumer once taken on to the system, becomes dependent upon that system for a prime necessity of business, comfort, health and even life. He must surrender, and swallow his choken sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again, and perhaps still again, he cannot resist, lest he lose the water."

In the case of *Burke* v. *Water Valley,* 87 Miss. 732, the court in passing on a similar regulation said: "If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of gas from the other. Where a consumer of water who was in default, after the water was turned off, tendered his arrears, but refused to pay one dollar, as required by regulation of the company for turning the water on, the court, by mandamus, compelled the company to turn the water on, holding the regulation to be unreasonable. See, also,

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Smit v. *Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123."

This court in citing this case and others upon the instant point agreed that such regulations were unreasonable and therefore reversed the judgment in said case.

The learned council for the appellant contend that there was no difference between cutting out the service once installed and refusing to contract. We submit there is a vast difference. That this contract with this appellee provided if I am in arrearage for gas and electric service furnished or for pipes, wiring or appliances furnished at the above designated place, or at any other place, or if any member of my household is in arrears, which arrearage accrued while he was such a member of my household, the company shall render me a bill for such arrearage, and if I fail or refuse to pay same on demand, or if I should fail or refuse to comply with any of the foregoing conditions, then the company may remove the meter, sever all connections, either gas or electric, and discontinue the service."

This was a contract made by the appellants, a contract of their own wording, and of their own choice, and under the law should be strictly construed against the appellant. They drafted the contract, placed therein the items they desired covered, and nowhere in said contract is it provided that they may refuse service or refuse to contract with a party for failure to meet their unjust demands. This appellant when she signed the contract on May 6, 1918, was at the mercy of this corporation, monopolistic in its nature without competition, and the only alternative she had was to sign the contract required or continue to do without the service of what has come to be, in the crowded cities, a necessity. This court has held, "it is a public service corporation without competition, monopolistic in its nature, and the patrons have no choice but to accept its service nor have they any choice but to accept its services.

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They have not the privilege of selecting to do business with competitors because there is no competitor, and for this reason the right of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands." 89 Miss., page 263." The necessity of the law must meet modern conditions.

"The action of the telephone company was wrong, and it was not necessary for Mr. Hobart to pay the wrongfully demanded bill for the purpose of retaining the telephone in his dwelling; if he had done this, it would have been necessary for him to sue for the recovery of the amount overpaid, and to require him to do this, in the language of the case of *Wood* v. *Auburn*, 29 L. R. A. 377, would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process." 89 Miss. 263.

If we admit for the sake of argument that Miss Steele was indebted unto the Meridian Light and Railway Company for service at a prior residence and under a prior contract still this court has decided in the case of the *Telegraph Company* v. *Hobart*, 89 Miss. 259:

"In the first place, there were two contracts between different parties; in the next place if this were not true, they were separate contracts about different properties, and the telephone company could only cut out that telephone for which they had been in default in payment, it (telephone company) had no right to undertake to coerce payment of the amount due on the other telephone by refusing to reinstate the service in his house. In the first place he did not owe it; it was his wife's debt. And in the next place if he owed it, it was a separate contract, and the appellant could only put an end to the particular contract wherein there was default. If gas is supplied to the owner of different

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houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of gas from the other." Further this court held:

"A telephone company may cut out a subscriber for non payment of dues on reasonable notice, when the dues are not actually paid, but when they are paid or when they are offered to be paid, it acts at its risk in refusing reinstatement of service."

This case comes squarely under the Hobart case. The testimony herein is nearly parallel thereto and the instructions granted to the plaintiff were in the language of the court in the Hobart case, facts merely changed as to fit the facts in the instant case.

This court in the Hobart case decided: "When the appellant declined to reinstate it after having been offered the rental of the telephone in the dwelling house it was its duty to reinstate it; and not having done so, it should compensate Hobart for his pecuniary loss, and such inconvenience and annoyance in being wrongfully deprived of its use, as the jury thought proper under the facts. We do not say that damages for inconvenience and annoyance may be recovered in all cases, but from the very nature of the subject-matter of this litigation, annoyance and inconvenience is one of the main elements of damage. Citing the case of *Railway Company* v. *Bloom*, 71 Miss. 247, the court held that damage for discomfeiture and inconvenience might properly be considered as compensatory damages."

Miss Steele has a right to presume, from the action of the company as shown by the testimony, that she was not indebted to the company. If she had been indebted, as they claimed, they had no right to refuse to render service. If they had desired to enforce the collection of this disputed account, it was their duty to have enforced through the proper courts their demands.

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COOK, J., delivered the opinion of the court.

On September 4, 1909, the appellee entered into a contract with the appellant to furnish her with electric light current for her home, No. 1612 on Fourteenth Street. On August 28, 1915, Miss Steele, the appellee, moved her residence to another house in the city of Meridian. About two years after the removal of her home Miss Steele entered into correspondence with the light company looking to the installment of electric lights in her new home. Finally Miss Steele signed this contract:

"Electric | Service Application.

"Name, Miss Gertrude Steele, Occupation

"Address, 1627, 15th St., Meridian, Miss., 5/6/1918.

"I hereby make application to the Meridian Light & Railway Company for *Elec.* to be supplied by meter to be located on premises 1627 15th St. as a residence, and agree to pay for the same promptly at the regular price and according to the rules of the Company; and to pay for all *Elec* registered by said meter until forty-eight hours after written notice has been given the company to discontinue the service.

"I further agree that the duly authorized agents of the company shall have free access to the meters and connections, including all pipes and wiring, at all reasonable hours and for any purpose.

"I further agree to pay a minimum charge of one dollar for each electric meter per month and fifty cents for each gas meter per month and agree to assume all risks as to damage caused by defective wires or pipes.

"I further agree that if I am in arrears with the company for gas or electric service furnished, or for pipes, wiring, or appliances furnished at the above-designated place, or at any other place, or if any member of my household is in arrears, which arrearage accrued while he was such a member of my household,

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the company may render me bill for such arrearage, and if I fail or refuse to pay same on demand, or if I should fail or refuse to comply with any of the foregoing conditions, then the company may remove the meter, sever all connections, either gas or electric, and discontinue the service.

"I have retained a copy of this application and understand fully its terms and conditions.

"[Signed] MISS GERTRUDE STEELE,
"STEELE EVANS."

After the signing of this contract the light company presented her with a bill for alleged arrearage to the company for electric and gas service furnished her in the former residence. Miss Steele and the light company could not agree about this claim, and finally the company, after a lapse of two or three days, agreed to make connection with her residence, and carried out their contract by installing the lights, the company insisting that the contract was valid and binding.

Inasmuch as we have reached the conclusion that the contract signed by Miss Steele, in so far as she may be bound to pay the arrearages on her former residence before the installment of lights in her present residence, was without consideration and void, and this being true, we hold that she was entitled to actual damages under the facts of the record. *Hobart Case,* 89 Miss. 252, 42 So. 349, 119 Am. St. Rep. 702.

There was nothing in the record warranting the recovery of punitive or exemplary damages, and it was error to instruct the jury that they might in their discretion find for such damages.

Reversed and remanded.

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WESTERN UNION TELEGRAPH CO. v. NORMAN.

[83 South. 465, In Banc. No. 20710.]

1. COMMERCE. *Right and liabilities as to interstate telegram covered by federal law.*

A telegram sent from a point in one state to a point in another state is interstate commerce and in such case the right and liabilities in connection therewith depend upon the acts of congress, the contract contained on the telegraph blank, and the common-law principles accepted and enforced by the federal court.

2. TELEGRAPH COMPANY. *Not liable for punitive damages for acts of agent while engaged in interstate commerce.*

Punitive damages are not recoverable against a principal while engaged in interstate commerce unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed.

3. STIPULATION LIMITING LIABILITY AS TO INTERSTATE COMMERCE VALID. Under the act of Congress, June 18, 1910, ch. 309, a telegraph company, which had filed rates with the interstate commerce commission, was not liable for delay in the transmission of a telegram for any amount in excess of the price of the message, where the telegram so stipulated.

APPEAL from the circuit court of Forest County. HON. ROBT. S. HALL, Judge.

Suit by M L. Norman against the Western Union *Telegraph Company* v. *Hawkins,* 73 So. 873, of the defendant appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, for appellant.

1. In answer to the first question we have to say that this court is bound by the interpretation placed by the supreme court of Alabama in the case of the

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Telegraph Company v. *Hawkins,* 73 So. 873, of the Acts of Congress of July 18, 1910, unless this court is prepared to say that the Hawkins case is not the law of the state of Alabama as applied to contracts of this character. If it is the law of Alabama, then under the well-settled rules, it entered into and became a part of the contract as fully and completely as if expressly referred to and incorporated in its terms and is binding upon this court.

The question to be determined by this court is, what is the law of the state of Alabama, and that is not to be determined by the conclusion that this court might have reached in its interpretation of the statute or the conclusion which it has reached when applied to transactions and contracts arising in this state. See *Johnson* v. *The Western Union Telegraph Company,* 10 L. R. A. (N. S.), page 256, where is a full discussion on the subject.

We are certainly unable to see why the interpretation placed by the supreme court of Alabama upon the Act of Congress is not just as much the law of Alabama as the interpretation of that court placed upon one of its own statutes or one announcing its interpretation of the rules of the common law. The *lex loci contractus,* for the general rule see 9 Cyc., page 668; *Edwards* v. *Kearzey,* 96 U. S. 595, 24 L. Ed. 793.

We think we showed in our original brief that the rule is well settled in this state, See *Commercial Bank* v. *Auze,* 74 Miss. 609; *Brown Bros.* v. *Freeland & Murdock,* 74 Miss, 181; *Partee* v. *Silman,* 44 Miss. 272; *Brown* v. *Nevitt,* 27 Miss. 801; *Bant* v. *Tarlton,* 23 Miss. 173.

We cite the following cases in which the telegraph companies were parties and where the claims for damage were similar to those in the case at bar, to show how general is the application of the rule. Alabama: *Western Union Tel. Co.* v. *Favish,* 71 So.

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183; Arkansas: *Western Union Tel. Co.* v. *Woodard,* 105 S. W. 579; Connecticut: *Penobscot Fish Co.* v. *W. U. Tel. Co.,* 98 Atl. 341; Iowa: *Markley* v. *W. U. Tel. Co.,* 132 N. W. 37; Missouri: *Reed* v. *W. U. Tel. Co.,* 37 S. W. 904; North Carolina: *Johnson* v. *W. U. Tel. Co.,* 57 S. E. 122; Oklahoma: *Western Union Tel. Co.,* v. *Pratt,* 89 Pa. 237; Texas: *Western Union Telegraph Company* v. *Walker,* 74 S. W. 751; *Ligon* v. *Western Union Telegraph Company,* 102 S. W. 429; Wisconsin: *Fox* v. *Postal Tel-Cable Co.,* 120 N. W. 399; *Telegraph. Company* v. *Robins,* 109 Miss. 775; *Alexander* v. *Pullman Car Company,* 117 Miss. 348

Aside from the foregoing considerations and aside from the decision in the Dickerson case, I have never been able to understand why this court has apparently ignored the rule laid down in the case of the *Southern Express Company* v. *Ryers,* 240 U. S. 60, L. Ed. 825-827, in reference to damages for mental anguish.

In the case at bar the telegram was unquestionably interstate commerce, that has been settled too clearly by repeated decisions of the supreme court of the United States to admit of question. Being such, aside from any consideration of the application of the Act of Congress, the subject was governed by the principles of the common law as accepted and enforced by the federal court, and therefore, any instruction that damages for mental anguish could be recovered was erroneous. In none of the decisions which have been heretofore rendered by this court has it passed upon the Byers case and its application to matters strictly interstate commerce.

I have never been able to understand how this court in dealing with a Federal transaction that is to say, matters of interstate commerce purely, could refuse to apply a rule as laid down by the Supreme Court of the United State as govenring such transactions. The

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telegram in this case was just as much interstate commerce as the shipment of casket and grave clothes in the Byers case, and there certainly can be no reason, that I can see, why the right to recover for mental anguish in one should be denied and given in the other.

If the subject-matter in this suit was an interstate shipment would this court be governed by the rule laid down in the Byers case? Manifestly under the well settled and well recognized rule, the subject-matter being one of interstate commerce, a matter of Federal concern, this court would necessarily be governed by the decision of the supreme court of the United States.

2. In the response to the second question, that is to say, whether conceding that the interpretation of the Alabama court of the Act of Congress as announced in the Hawkins case is binding upon this court, can punitive damages be recovered in an amount exceeding that stipulation in the contract. We have no hesitation in saying that the limitation in the contract is binding and enforceable, and damages in excess of the amount limited cannot be recovered, whether these damages are actual or exemplary. Why? It seems that the conclusive answer is that this contract is to be governed by the Alabama Law, and conceding that the Hawkins case announces the Alabama Law, the Alabama court has held distinctly in the Hawkins case that the stipulations in the contract "are binding on the sender of the message, State laws and decisions to the contrary notwithstanding, and that the state courts are without jurisdiction to declare the matter unreasonable unless so predetermined by the Interstate Commerce Commission," and bases its decisions upon the numerous cases cited in the opinion holding the same.

We must not be taken as conceding that this is a case for punitive damages. We think, on the record, it is

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utterly barren of any evidence of malice, fraud, or wilful wrong.

3. In answer to the third question propounded by the court, we have to say, first, that we cannot see by what process of reasoning this court will reach the conclusion that the Alabama Law does not apply to this contract for the reasons we have set forth above.

Under the law of Alabama this is the character of case in which damages for mental anguish cannot be recovered. See *Western Union Telegraph Company* v. *Sledge,* 153 Ala. 291, 45 So. 259, in that case it was expressly decided that damages for mental anguish will be *restricted to messages relating to sickness or death,* see *also Telegraph Company* v. *Westmoreland,* 151 *Ala. 319, 44 So. 382.* It was expressly held in the Sledge case that damages for mental anguish could not be recovered for the nondelivery of a telegram to meet the sender at a Railroad station where, as the result of the failure to transmit the message no actual tort was committed upon the plaintiff. The giving of this instruction violates the Alabama Law.

We must not be taken, however, as abandoning our position that as under the rule laid down in the Byers case, supra, that this transaction as being interstate commerce was governed by the Federal rule as to mental anguish, and that the rule must be applied throughout. But if mistaken in this, then certainly the Alabama Law as to mental anguish must govern, and damages for mental anguish of the character here claimed cannot be recovered in Alabama. We are citing below a number of cases from Alabama and elsewhere in which it has been held that in case of this character, damages for mental anguish cannot be recovered. Federal: *Stafford* v. *Western Union,* 73 Fed. 273; Alabama: *Western Union Telegraph Company* v. *Longe,* 41 So. 3965. (Semble); *Western Union Tel. Co.* v. *Pattie Westmoreland,* 44 So. 382; *Western Union Tel.*

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Co. v. *Sledge,* 45 So. 59; *Western Union Tel. Co.* v. *Lucile Westmoreland,* 43 So. 790; Compare *W. U.* v. *Collins,* 47 So. 61 ($345 held excessive for "inconvenience and annoyance" of twenty-mile hack drive): Arkansas: *Western Union* v. *Hogue,* 94 S. W. 924; *Western Union* v. *Hanley,* 107 S. W. 1168; Indiana: *Western Union* v. *Bryant,* 46 N. E. 775 (Mental distress and nervous prostration); Mississippi: *Yazoo, etc., R. R.* v. *Foster,* 23 So. 581. (Recovery allowed for tolls and costs of conveyance walking two miles); North Carolina: *Williams* v. *Western Union,* 48 S. E. 559 (have Dr. R. meet me at W. Friday); Pennsylvania: *Allen* v. *Western Union* (Ct. of common pleas Erie Co. 1903, althought sender a woman and sick, arriving in the night time); South Carolina: *Jones* v. *Western Union,* 55 S. E. 318 (Meet me at Union this P. M.) (But see *Toale* v. *W. U.,* 57 S. E. 111, infra; *Dempsey* v. *W U.,* 58 S. E. 9, infra; *Todd* v. *W. U.,* 58 S. E. 433; *Kirby* v. *W. U.,* 58 S. E 10; Texas: *Western Union* v *Ragland,* 61 S. W. 421, (Recovery allowed for loss of time but not exposure); *W. U.* v. *Smith,* 76 Tex. 253, 13 S. W. 169 (No recovery for exposure); *W. U.* v. *Campbell,* 81 S. W. 580 (No recovery without proof that plaintiff could not have obtained a conveyance, and no recovery for catching a cold because of having no night dress).

4. In answer to the fourth injuiry we refer the court to our answer to the third injuiry and authorities therein set forth. See *Western Union Telegraph Company* v. *Miller,* 97 Miss. 225; *Railroad Company* v. *Prentice,* 147 U. S. 101, 37 L. Ed. 97; *Adams express Co.* v. *Croninger,* 226 U. S. 491, 33 Sup. Ct. 148 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *K. C. S. R. Co.* v. *Carl,* 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; *H. E. & W. T. Ry. Co.* v. *U. S.,* 234 U. S. 342, 34 Sup. Ct. 432, 58 L. Ed. 1341; *So. Ry. Co.* v. *Prescott,* 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836.

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We respectfully submit that the judgment of the court below should be reversed and the cause remanded.

Tally & Mayson, for appellees.

This is an action intort and not on contract, as seems to be implied in the brief of learned counsel for appellant, under the well-settled law in this state, a violation of a general duty to the public is, regarded as determining the character of the action as oue founded in tort and not on contract; and sufficient to authorize the jury in awarding exemplary damages. *Heirn* v. *McCaughan et ux.,* 32 Miss. 660, 72 Am. Dec. 588; *New Orleans, Jackson, etc., R. R. Co.* v. *Hurst,* 36 Miss. 660, 74 Am. Dec. 786; *M & O. R. R. Co.* v. *Waters,* 74 Miss. 539, 41 So. 240.

We submit, however, that the suit was on tort but if it was in contract that neither the Federal nor the Alabama Rule would prevail in this state. Both have been expressly repudiated by our own court: *Dickerson* v. *Western Union Tel. Co.,* 114 Miss. 115, 74 So. 779; *Warren-Goodwin Lbr. Co.* v. *Postal Tel. Cable Co.* 116 Miss. 660, 72 So. 601; *Western Union Tel. Co.* v. *Teague et al.,* 117 Miss 407, 77 So. 302.

If the message in question is to be treated as an Alabama contract and that recovery can be only had in an action of contract, the doctrine contended for by appellant cannot prevail. No breach of contract occurred in the state of Alabama. The Alabama rules and decisions would then be inapplicable. A state cannot impose by its statutes or decisions liability that would extend to conduct beyond the territorial limits of the state. *Dickerson* v. *Western Union Tel. Co.,* 114 Miss. 115, 74 So. 779.

Learned counsel have cited many cases where the Federal rules prevail. It may be true that some of the inferior Federal courts, showing that the alleged

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courts of some of the states have wholly or partially adopted the so-called Federal rule, but we note with much satisfaction that it has never prevailed in this state, except for a very short time when the *Showers case,* 73 So. 276, was in force and which was overruled by the *Dickerson case, supra.*

The supreme court of that state recently had occasion to differentiate between actual and explemary damages. It appears to be a rule in that state that exemplary damages are such as are awarded for an indictable offense and that injuries to the person or estate of an individual, including mortification, humiliation and mental anguish, are all elements of actual damages. *Vincent* v. *Morgans La. Co.,* 74 So. 541.

Since then the appellant insisted that the question of damages be determined by the Louisiana Law, and threw down the gauntlet in that plea; the appellee accepted the challenge and expressed a willingness to have the damages other than the money paid out, determined adjudicated under the laws of that state. Thereupon the instruction in question was asked for and given by the court.

Though the message in question was an unrepeated message, the appellant could not stipuplate against its own negligence and the stipulation with reference to unrepeated messages are absolutely invalid if the appellant was guilty of any negligence in transmission.

Complaint is also made by appellant that appellee asked for and obtained an instruction to the effect that the message in question was handled in such a manner as to evidence willfullness or gross negligence, that the jury in its discretion might impose punitive damages. That pronouncement of the law was and is correct. No rule is better settled in this state than that. *Western Union Tel, Co.* v. *Watson,* 82 Miss. 101; *Sternberger* v. *Western Union Tel. Co.,* 97 Miss. 884, 76 So. 738; Cooley on Torts (3L. Ed.), page 94

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Ratification can be shown by a, retention in its employ by the principal of the agent whose conduct is responsible for the act complained of. *Pullman Co.* v. *Alexander*, 117 Miss. 348, 78 So. 293.

We respectfully submit that the appellee has a very meritorious case and that, considering everything, the verdict of the jury was extremely small, and that the case should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellee instituted suit in the circuit court of Forrest county against the appellant for the sum of thirty-five dollars as actual damages and one thousand, five hundred dollars punitive damages for the alleged negligent failure to properly transmit and promptly deliver a telegram sent by appellee from Akron, Ala., to his wife in Hattiesburg, Miss., which reads as follows:

"Akron, Alabama, July 29th, 1916.

"Mrs. M. L. Norman, West Pine Street, Hattiesburg, Mississippi. Do not catch train for Tuscaloosa.

[Signed] M. L. NORMAN."

In the transmission of the message the agents of the appellant company changed the name of the addressee to Mrs. M. L. German. Because of this mistake the message was not delivered to Mrs. Norman and in fact was not delivered at all until several days later, when the appellee went to the telegraph office, and, after some discussion with the agent of the appellant at Hattiesburg, the message was then delivered to him. Mrs. Norman made the trip to Tuscaloosa, and the actual expenses of this trip amounted to thirty-five dollars which were paid by the appellee. In another suit Mrs. Norman recovered the actual damages sustained by her because of this mistake.

There were a number of special pleas filed in this case, and it seems from the record that demurrers were filed and sustained to all of these special pleas. The

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second plea of the appellant company alleged, in substance, that the message in question was delivered to and accepted by the appellant company subject to the terms of a certain contract in writing, a copy of which is attached and made a part of this plea; that one of these terms and conditions is that the company should not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message beyond the amount received for sending the same, and that the message in this case was an unrepeated message; that by the Act of Congress approved June 18, 1910 (36 Stat. 539, chapter 309) the Congress of the United States assumed charge of regulating the field of interstate communication by telegraph, and conferred upon the Interstate Commerce Commission full power over the rates, charges, and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and conferred on the Interstate Commerce Commission power to approve, alter, or acquiesce in existing rates and classifications; that the Interstate Commerce Commission prior to the filing of the message in question had approved the rates of the appellant company, and for these reasons that the stipulations in the contract, subject to which the message was accepted which limited the defendant's liability to the price of the message, were reasonable, and valid and binding.

The record does not show that a demurrer was filed to this plea, neither does it show that issue was taken upon it, but from the entire record it is apparent that the case was tried upon the assumption that this plea was insufficient as a matter of law. In fact at the time of the trial of the case of *Dickerson* v. *Western Union Tel. Co.*, 114 Miss. 115, 74 So. 779, and *Warren-Godwin Lumber Co.* v. *Postal Tel. & Cable Co.*, 116 Miss. 660, 77 So. 601, the latest announcements of this court upon this question, expressly held that these

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stipulations appearing upon the back of the telegraph blanks were unreasonable and void, and the learned circuit judge followed the ruling as announced in these two cases in so holding in this case. The question was further submitted to the jury as to whether or not punitive damages could be recovered by the plaintiff. The jury rendered a verdict in favor of the plaintiff in the court below for four hundred and fifty dollars from which judgment this appeal is prosecuted.

This court held in the case of *Western Union Tel. Co.* v. *Showers,* 112 Miss. 411, 73 So. 276, that Congress by the act of June 18, 1910, had taken possession of the field of interstate commerce by telegraph to the exclusion of the power of the state to legislate with reference thereto. This decision was subsequently overruled by the *Dickerson case supra.* The question decided in the case of *Warren-Godwin Lumber Company, supra,* is the indential question now before us, namely, whether or not liability of the telegraph company for a negligent error in sending an unrepeated message would be limited to the amount paid for the transmission of the message in accordance with the stipulation contained on the telegram. This court, following its decision in the Dickerson Case, held that this stipulation was void. This Warren-Godwin Lumber Co. Case has been lately decided by the supreme court of the United States, and the judgment of this court is by it reversed. 250 U. S. —, 40 Sup. Ct. 69, 64 L. Ed. —. In this opinion the supreme court of the United Statesc holds that the act of 1910 "was intended to control telegraph companies by the Act to Regulate Commerce," and that this act subjects telegraph companies "as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act of Regulate Commerce to establish, a purpose which would be wholly destroyed if . . . the validity of contracts made by telegraph

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companies as to their interstate commerce business continued to be subject to the control of divergent, and it may be conflicting, local laws." This opinion holds that the stipulation in the contract above referred to is a valid and binding one. *Primrose* v. *Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.

In the Primrose Case "it was held that such a contract was not one exempting the company from liability for its negligence, but was merely a reasonable condition, appropriately adjusting the charge for the services rendered to the duty and responsibiity exacted for its performance.

This decision further holds that under the Act to Regulate Commerce above referred to telegraph companies are empowered "to establish reasonable rates, subject to the control which the act . . . exerted;" "that the power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose Case, the right to contract on such subject was embraced within the grant of the primary rate-making power."

Since the telegram in this case was interstate commerce, the rights and liabilities in connection therewith depend upon the acts of Congress, the contract contained on the telegraph blank (if such be the case), and the common-law principles accepted and enforced by the federal courts. *Southern Express Co.* v. *Byers*, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197.

Whether or not the plaintiff is entitled to recover punitive damages in this case is to be governed by the law announced by the United States Supreme Court. *Byers' Case, supra.* In the case of *Railroad Co.* v. *Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the leading case of that court upon the sub-

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ject of the recovery of punitive damages, it is held that punitive damages are not recoverable against the principal unless the principal praticipated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed. The testimony in the case at bar shows that the telegram was correctly transmitted to the New Orleans relay office of the telegraph company, that it was incorrectly transmitted from New Orleans to Hattiesburg, that the agent at Hattiesburg requested the New Orleans agent to know if the addressee was correctly named, and that the New Orleans office stated that she was. Even if we assume that this conduct of the New Orleans agent showed a reckless disregard of the rights of the appellee, at the same time the testimony fails to show that the principal participated in the wrongful act, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.

It follows that the special plea referred to is a good plea as a matter of law. The cases of *Dickerson* v. *Western Union Tel. Co.*, 114 Miss. 115, 74 So. 779, and *Warren-Godwin Lumber Co.* v. *Postal Tel. & Cable Co.*, 116 Miss. 660, 77 So. 601, or such parts of them as are in conflict with this opinion, are hereby expressly overruled.

Reversed and remanded.

RAWLINGS v. RAWLINGS ET AL.

[83 South. 140, In Banc. No. 20792.]

1. PARENT AND CHILD. *Duty of support. Enforcement by child of duty to support.*

While it is the duty of a parent to support his infant child, yet the existence of this obligation on the part of a parent does not

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justify a court of equity in entertaining a bill or action by the child against its father to determine in advance the amount of support and maintenance and compel obedience to its orders in premises by imposing a lien upon property of the parent or otherwise.

2. SAME.
The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel the performance of this duty. The duty may be enforced however under statute, or directly, as where a stranger supplies an infant with necessaries and recovers therefor against the parent.

3. HOMESTEAD. *Rights of children.*
There is no provision in law giving a child an interest such as the wife has in the homestead or rather lands of the father.

APPEAL from the chancery court of Adams county.
HON. R. W. CUTRER, Chancellor.

Bill by Earl Rawlings and others by next friend against Thomas Rawlings. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Ernest E. Brown, for appellee.

I submit with confidence the lower court should have sustained the demurrer, even if the bill of complaint can be treated as if it had charged defendant was able to support complainant's and had wrongfully refused to do so. In short a child cannot successfully maintain in Mississippi a suit in any court against his father for a support. As was decided in *East* v. *King,* 77 Miss. 738, he is legally liable to those who furnish his minor child with necessaries, where it is shown he was able to furnish the necessaries and wrongfully refused to do so, but the child cannot sue the father for an allowance or act as the judge of what his father should furnish him. A disinterested third person must look into the question as to whether what he furnishes the

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minor are necessaries that his father has wrongfully failed to furnish, and can only recover from the father upon alleging and proving he furnished necessaries the father could furnish and had wrongfully failed to furnish.

In many states where it is the law that a father is legally as well as morally bound to support his indigent minor child, there are statutes which prescribe how this legal duty may be enforced. In Mississippi a father who is able is liable legally as well as morally to support his minor child, who is indigent and incapable of supporting himself.

We have two statutes bearing upon the subject, to wit: Sections 3571 and 5055 (K) of Code of 1906, which reads as follows: "3571 (3148) Certain relatives bound to support pauper.—The father and grandfather, the mother and grandmother, and brothers and sisters, and the descendants of any pauper not able to work, as the board of supervisors shall direct, shall at their own charge, relieve and maintain such pauper; and in case of refusal shall forfeit and pay the county the sum of eight dollars per month, for each month they may so refuse, to be recovered in the name of the county; and shall be liable to any person who supplies such poor relative, if abandoned, with necessaries, not exceeding said sum per month."

"5055. Vagrants, who are (Laws 1904, ch. 144): The following persons are and shall be punished as vagrants, viz: Every person who shall abandon his wife or family, without just cause, leaving her or them without support, or in danger of becoming a public charge."

Under section 3571, of Code of 1906, the father of a pauper child, who is unable to work, is liable for the support of such child and to pay the county eight dollars per month or any person who furnishes the necessaries for such child not exceeding eight dollars

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per month for every month he fails to furnish such child with necessaries.

Sec. 5055 (K) makes a father, who abandons his child without just cause, leaving him in danger of becoming a public charge a vagrant, and under the following section 5058 the father is made liable to commitment to jail, unless he gives bond for support of such child.

The above statutes contemplate that the county or a person furnishing the indigent child with necessaries can recover from a parent for same to an amount not exceeding eight dollars per month or that the state on an affidavit charging the father with being a vagrant on account of his leaving an indigent child without support can compel the father to give bond for support of his child for twelve months. There is however, no statute of this state or decision of this court that even hints that a child, no matter how young or indigent or helpless, can sue his father for a support. On the contrary every expression of this honorable court from its earliest history is opposed to the contention of appellees that they can maintain a suit for a support against their father. It has expressly held a minor child could not recover from his father for personal injuries inflicted by his father upon him.

"The peace of society, and of families composing society, and of a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state through its criminal laws will give the minor child protection from parental violence and wrongdoing, and this is all the child can be held to demand." *Hewlett* v. *Ragsdale*, 68 Miss. 703, 711.

In another case decided fifteen years later or during November Term, 1916, it was decided even that one

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standing *in loco parentis* towards a child is not liable in damages to the child for chastisement inflicted upon the child. CALHOUN, J., in delivering the opinion of the court said: "It is conceded and is plainly the law, that, if Holmes stood *in loco parentis,* there could be no civil action by the child, it is also conceded as is clear from this record, that he was in that relation, unless it was changed by the testimony of the mother, contradicted by several witnesses, that when she gave the child, she said she was not to be whipped. This does not alter the relation or change the *status* of the child, who was to be taken and treated as one of the children of the family." *Rosa Fortinberry by next Friend* v. *Marshall Holmes,* 89 Miss. 373, Ib. 42 So. 799.

It is true a chancery court has jurisdiction to render decrees for the management and sale of property of minors, but in the instant case no property or property rights of a minor are involved, but minors simply have sued their fathers for an allowance and asked that the allowance be made a lien upon property of their father. The lower court treated the suit of the minors as if it was one by an indigent wife for a decree for alimony against her husband, who was able to support her and had wrongfully failed so to do. The chancery court is vested with full jurisdiction of marriage and divorce by chapter 37, of Code of 1906, and as divorces are discouraged by the courts in the interest of society as well as of the family life, this court has favored the granting of alimony to an indigent wife against an erring husband dissolving the bonds of matrimony. *Garland* v. *Garland,* 50 Miss. 694; *Verner* v. *Verner,* 62 Miss. 260; *McFarland* v. *McFarland,* 64 Miss. 449.

Where the wife is entitled to alimony either with or without a divorce being granted her, she has an interest which enables her to vacate an invalid conveyance of the homestead by the derelict husband. *Scott* v. *Scott,* 73 Miss. 575, 580.

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The wife's right to alimony constitutes an interest in her husband's estate, which she can protect by describing in her bill of complaint the real estate of her husband upon which she wishes the alimony made a lien and by filing a *lis pendens* notice under section 3148, of code of 1906, describing the realty to be fixed with a lien for payment of the alimony. See *Gallaspy's Sons Co.* v. *Massey,* 99 Miss. 208, 216.

There is, however, no statute of this state or decision of this court that even hints a minor child has an interest in his father's estate that enables him to obtain a decree against his father for a support and fix as security for its payment a lien upon his father's realty, and the decision of the lower court is contrary to all previous expressions of this court, which deny the minor child the right to sue his father even for a personal injury.

Should the startling decision of the chancellor be affirmed and established as the law in this state, parental discipline will be undermined, the welfare of society and peace of families disturbed and the courts likely be flooded with suits by extravagant and unruly minor children against their fathers for unreasonable allowances to be fixed as liens upon real estate of their fathers, in which they have no interest whatever.

Parental discipline, the peace of the family and public policy forbid that a minor child should have the right to sue his father for an allowance and have same fixed as a lien upon the father's realty.

L. T. Kennedy, for appellee.

It is admitted that it is the legal duty of the father to support and maintain his children and complainants in pursuance of their legal rights ask a remedy. We will take up the questions presented in counsel's brief in their order.

He contends there is no description given in the bill of complaint of the plantations, neither the county in

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which they are located, nor whether they are income producing or not. Our answer to this is—that it is not necessary to describe the property in detail in the bill of complaint, but the *lis pendens* notice is the proper place to insert the description of the property. As to whether the property is income producing or not is absolutely immaterial upon the question of the children's right to a support from their father. The law books lay down the principle that it is the duty of the father to support and maintain his children, and we nowhere find this principle conditioned upon the fact as to whether or not his property is income producing, or whether or not he is able financially. The question of his ability financially only has to do with the amount or the station in life in which he shall maintain his children. We submit that it is not necessary that it should be alleged that the father is able to support his children.

However, the bill of complaint alleges that he is the owner of certain plantations and the *lis pendens* record in the same cause and obtained by the complainants sets up the name of the three plantations aggregating about twenty-two hundred acres.

The ability of the father to support the children is only a question going to the amount, which he should be required to expend for their support and is purely defensive and cannot be raised by demurrer.

If he is not the owner of the plantations described in the *lis pendens*, then the notice could in no wise affect him and he has no just cause of complaint with respect to such action. If he does own the three plantations, a presumption of which, we think fairly arises from the record if it is not distinctly stated as a fact, it then comes with very poor grace that he should present to this court by way of demurrer, that it should first be shown he is able to support his children, notwithstanding he owns twenty-two hundred acres of land.

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In the next place, counsel urges that a child cannot successfully maintain a suit in Mississippi against its father for support. The proceeding is based entirely upon that principle of law, that makes it the duty of the father to support the child and that wherever there is a right, there is a remedy.

Section 35071, of the Code, which permits any person, who supplies a child with necessities to recover from the parent was simply granting a right to third persons, who had furnished necessities to a child, and in no wise was intended to take away from the child the remedy to pursue his own rights.

The case of *East* v. *King* 77 Miss. 738, cited by counsel only construes the statute by simply stating that a father is legally liable to one who furnishes his minor child with necessities. It does not hold that the child itself could not recover. It would place the law in a very peculiar situation to hold that a minor child had a right to demand support of its father, but that its only remedy was to induce some third person to furnish him with the necessities of life and that the third person, at his own costs, expense and risk should recover from the father of the child by showing that the father was able to support the child, that he had refused, and that the supplies furnished were necessities for the child. If such is the law, where is the third person, or the merchant, who would assume such responsibilities and take such risks to furnish the necessities for the helpless children of an unworthy parent?

Counsel for appellant relies upon the cases of *Hewlett* v. *Ragsdale,* 68 Miss. 703; *Fortenberry* v. *Marshall,* 89 Miss. 373, but both of those cases were seeking civil redress for personal injuries, suffered by a child at the instance of the parent. The court held that a child could not seek civil redress in our courts for personal injury by a parent or a person who stood *in loco parentis* towards a child or who was exercising their

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parental authority. Both of those rested upon a principle far removed from the one sought to be enforced is the case at bar. Both are based upon an allegation of abuse of parental authority. The case at bar is based upon a legal right of the child and the legal duty of the father. Both of those cases were based upon an alleged commission of a wrong and this case is based upon an admitted omission of a legal duty.

It is perfectly plain to any one that our courts should not be open to children to sue their parents on account of chastisement. But it is equally as plain that our courts should be and are open to children to obtain from their father, their just rights. There is no question in the case at bar affecting or questioning the exercise of parental authority, but merely the neglect of a parental duty.

The case is not based upon section 1673 of the Code of 1906, upon the question of the court having authority to make all orders touching the care of children, when a divorce shall have been granted, but we can find a very helpful decision upon that section in connection with the case at bar. In the case of *Garland* v. *Garland,* 50 Miss. 694, annotated under the above section, it was held that the above section did not prevent the courts from entertaining bills and making decrees for separate maintainance for the wife, without a bill for divorce, the principle in the Garland case is not based upon the above section, but it is based upon the duty of the husband to support the wife and the court says, that such a proceeding is not prevented by section 1673.

It is the duty under the law for the husband to support a wife, but the wife may lose her right by wrong doing. It is likewise the duty of the parent or father to support a minor child and the right may be enforced in like manner. The right of a wife to separate maintainance, without a divorce, is not based on any statute, but

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is a right by virtue of the relation and the courts afford a remedy.

We do not for one moment contend that minor children, who are living with their father and being supported in the same way he is supported, eating at his table and living in his home could successfully maintain an action against him for failure to support them. Such a parent would not be a vagrant under our statute, but where a parent does not live with his minor children, does not support them or does not contribute anything to their support, but has promised time and time again that he would do such; has three plantations and when called upon by the court even then demurs, to a bill of complaint, that asks support for six minor children, we submit that a different state of facts is submitted.

STEVENS, J., delivered the opinion of the court.

The six minor children of Thomas Rawlings, appellant, exhibited, by next friend, their bill of complaint against their father, alleging that the defendant had not lived with them or their mother for a number of years; that their father had not for a long period contributed anything to their support; that the mother was not able to care for them and that they were without means of support; that the defendant was the owner of a certain plantation, and that this plantation "is liable to them for a support." The prayer of the bill is that upon final hearing "the court will ascertain what amount is sufficient for the monthly support of said minor children, and order and decree that such amount be paid monthly by the defendant, and that the same be made a lien upon the property of the defendant," etc. The alleged plantation of the defendant is not described in the bill, but a *lis pendens* notice was filed, indicating in a general way the real estate upon which a lien is

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sought. The defendant demurred to the bill, the demurrer was overruled, and this appeal prosecuted.

This is not an action for board and lodging furnished the minors, either by the mother or a third person. This is a proceeding in equity to have the chancellor fix in advance a monthly allowance for the infant children of the defendant, to enter a decree requiring the defendant to pay the sum fixed, and to adjudge a lien upon the defendant's real estate for the sums so ordered to be paid. The law as known and expounded for centuries fails to sanction any such proceeding. We recognize to the fullest extent the obligation of a parent to support his infant child, and nothing said in this opinion would discount in the least this primary obligation, imposed by the law of nature. The question before us is one as to the remedy in the case made by the bill. Does the existence of the obligation on the part of the parent justify a court of equity in entertaining a bill or action by the child against its father to determine in advance the amount of support and maintenance, and compel obedience to its orders in the premises by imposing a lien upon property or otherwise? On this point the authorities are in accord. In 21 Am. & Eng. Ency. of Law (2 Ed.), p. 1052, it is said:

"The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel the performance of this duty. The duty may be enforced, however, under statute, or indirectly, as where a stranger supplies an infant with necessaries and recovers therefor against the parent."

In 20 R. C. L. par. 31, it is said that:

"The civil remedy is more commonly worked out by holding that, if the father leaves his children destitute, he confers on any one who finds them in that condition an agency to supply them with necessaries; the volun-

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teer can therefore recover the cost of the supplies from the father in a civil action."

Practically the same declaration is made in the text of Cyc. (volume 29, p. 1614), and on page 1683 it is pointed out that "actions by children against their parents are not to be encouraged, . . . and a minor child has no right of action against a parent for the tort of the latter." In the footnotes to the text last quoted is our own case of *Hewlett* v. *George,* 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. In this case, which appears in our reports as *Hewlett* v. *Ragsdale,* our court, by WOODS, J., in forcible language declared:

"The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

This language was quoted with approval by the supreme court of Tennessee in *McKelvey* v. *McKelvey,* 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 130. There has been brought to our attention no case which, based upon the common law or general equity jurisdiction, sanctions this proceeding. On the contrary, the exact question was elaborately considered, and the point ruled adversely to the contention of complainants, in the case of *Huke* v. *Huke,* 44 Mo. App. 308. In the Huke Case, a daughter seventeen years of age, by next friend, filed her petition in equity against her father for support and maintenance. It was there, as here, contended that the chancellor has full jurisdiction over the persons and property of infants but the court of appeals of Missouri observed:

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"This action proceeds in the face of elementary principles."

The court further said: "No instance is found in the books where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any Popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the Lord Chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 W. III, c. 4. The very enactment of this statute—the necessity in the state of the law for such a statute—shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced Christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the Lord Chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, c. 30; 1 Bla. Com. 449. . . . No court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced."

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An in *Alling* v. *Alling*, 52 N. J. Eq. 92, 27 Atl. 655, paragraph 1 of the headnotes reads:

"1. A court of chancery has no jurisdiction to compel a parent to support an infant child."

In the opinion by PITNEY, V. C., the following language by the supreme court of Connecticut in *Finch* v. *Finch*, 22 Conn. 411, is quoted with approval:

"Connected with this obligation of maintenance there is a parental privilege. The parent is entitled to the custody and care of the child which he sustains, and to such service as it can render, and he has a right to exercise his own discretion in determining the fitness and necessity of the allowances to be made and of the support to be furnished to his children, for which he is to be made chargeable."

If the jurisdiction of equity has been enlarged in any of the states of the Union, it is certainly based upon some statute. We have in our state two statutes which indirectly bear upon the subject. Section 3571, Code of 1906 (section 6188, Hemingway's Code), imposes a duty upon certain relatives to support pauper members of their family. By this statute the father of a pauper child is made liable to the county in the sum of eight dollars per month for each month the father has failed or refused to provide the necessary support and maintenance, and furthermore is made liable to any person in like sum who supplies such poor relatives with necessaries. By section 5055 (section 3332) every person who abandons his wife or family without just cause, leaving her or them without support, or in danger of becoming a public charge, is declared a vagrant, and punishable as such. Statutes for the protection of the poor have been enacted in England, and in most, if not all, the states of the Union. The English Statute of 43 Eliz. c. 2, provides:

"The father and mother, grandfather and grandmother, of poor, impotent persons, shall maintain them,

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if of sufficient ability, according as the quarter session shall direct."

In considering the Connecticut statute, declared to be "nearly a transcript of the English statute on this subject," the supreme court of Connecticut ruled that their statutory provisions "embrace as well minor as adult children." *Finch* v. *Finch, supra,* 22 Conn. 416. Poor infants cannot then be said to be without some remedy. If a father, though able, becomes so depraved as willfully to abandon his offspring, he is answerable to the criminal laws of our commonwealth. But such cases must be few indeed. When they exist, they are generally the result of differences between husband and wife and a home broken up by domestic troubles. And in cases of divorce the chancery court is given jurisdiction by statute (section 1673, Code of 1906; section 1415, Hemingway's Code) to "make all orders touching the care, custody, and maintenance of the children of the marriage," that "may seem equitable and just," and afterwards may "change the decree, and make from time to time such new decrees as the case may require."

We are not justified in enlarging the jurisdiction of chancery beyond that indicated by the statute, and in opening the door of the courts to any unruly or disobedient child who may complain at either the amount or kind of support and maintenance provided by the father. The same reasons that led the court to the conclusion reached in *Hewlett* v. *Ragsdale, supra,* are persuasive here. "The repose of families and best interests of society forbid" any such action. If the chancellor can fix in advance the amount of support each dissatisfied child must receive, then is parental authority superseded by judicial *fiat,* parental discipline swept away by self-assertion and disobedience on the part of children, and the integrity of the home, the corner stone of society, is undermined. The bill even prays that a lien be fixed upon the father's real estate. By no provision

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of law is the child given an interest, such as the wife has, in the homestead or other lands of the father.

For the reasons indicated, the decree of the learned chancellor will be reversed, the demurrer sustained, and decree entered here in appellant's favor.

Reversed, and decree here.

ETHRIDGE, J. (dissenting).

After profound consideration of the question presented by this record, I find myself unable to agree with my Brethren. In my opinion their exegesis is erroneous, and fruitful of evil consequences to the helpless and unfortunate children of this state who have cruel, shiftless, heartless parents. The courts, and especially courts of equity should be diligent to discover and swift to remedy the wrongs of helpless children. It is the function of government to protect the weak and helpless from the wrongs of the strong, the cunning, and the vicious; and the fact that the strong, cunning, and vicious may happen to be the parents of the weak and helpless, instead of removing the protection, should be an additional reason for the exercise of diligence and the extending of the remedial aid of the court of equity. In order that my position may be better understood, I shall state the facts, and then my view of the law applicable to them, and afterwards consider the views of the majority, and the authorities cited sustaining that opinion, hoping to point out the errors therein contained.

The petition in this case was filed by the mother of the children as their next friend, and alleged that the petitioners were the children of the defendant (appellant), and that they were without means of support, and unable to earn a support; that they lived with their mother, away from their father; that the mother was unable to support them, and that their father was able to support them, and that it was his duty to do so;

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that he had repeatedly promised to support them, but that for several years he had contributed nothing to their support; that he was the owner if a plantation in the county of their residence—and prayed that the court inquire into their complaint and fix a reasonable sum for their support, adjudge the same against defendant, and impress a lien upon his property for the security of their support, and for general relief. The defendant demurred to the bill, thus confessing the truth of the allegations contained therein; the demurrer was overruled by the court below, and appeal granted to this court to settle the principles of the case. The majority of this court has decided that the suit is not maintainable, and that no relief can be granted by equity. The children have asked for bread, and the court has given them a stone. In my opinion the parental obligation to support children can be enforced in equity at the suit of the children, suing by next friend, and that this is the only effectual remedy to insure their support. Section 24 of the state Constitution reads as follows:

"All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

Section 512, Hemingway's Code (section 729, Code of 1906), reads as follows:

"The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contain sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different."

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Under these two sections it was intended by the law-making power of this state to grant a judicial remedy for the enforcement of every legal right, and that all forms of actions should be abolished, to the end that the court should not be embarrassed in enforcing rights where it had the facts before it, and should grant justice according to law, and not according to forms. It does not mean that any particular court has jurisdiction of a particular controversy, but it does mean that some court must be able to grant relief, where a legal right involving person, property, or reputation is presented. The constitutional provision, section 24 above quoted, is followed by a partition of the judicial powers among different courts, and providing in section 147 of the state Constitution that this court should not reverse a cause solely on the ground that the action was brought in the wrong court, but that, if the correct result was reached, the judgment should be affirmed, and the relief granted. The trial court retained jurisdiction, and if there be any legal right our duty is to either remand to the chancery court, from which the cause came, or to send it to the proper court for a trial on the merits. The jurisdiction of the chancery court is contained (so far as it affects this controversy) in section 159 of the Contitution of 1890, which reads as follows:

"The chancery court shall have full jurisdiction in the following matters and cases, viz.: . . .

"(a) All matters in equity;

"(b) Divorce and alimony;

"(c) Matters testamentary and of administration;

"(d) Minor's business;

"(e) Cases of idiocy, lunacy, and persons of unsound mind;

"(f) All cases of which the said court has jurisdiction under the laws in force when this Constitution is put in operation."

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The Constitution grants jurisdiction to the circuit court in section 156, which reads as follows:

"The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

It will be seen from the sections quoted that there is jurisdiction vested in these courts for the enforcement of all rights affecting person, property, or reputation. Does this suit lie? The majority opinion concedes that it is the legal duty of a parent to support the child. There can be no legal duty without a corresponding legal right. It would be idle, yea impossible, to declare a duty without at the same time declaring a corresponding right in the person or persons to whom the duty was owed. The one necessarily implies the other. Section 1415, Hemingway's Code (section 1673, Code of 1906), provides:

"When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the sum so allowed; and the court may afterward, on petition, change the decree, and make from time to time such new decrees as the case may require."

Is is reasonable to construe this section so as to make it inapplicable to other suits than divorce suits? I think not. The cases of *Garland* v. *Garland*, 50 Miss. 694, and *Verner* v. *Verner*, 62 Miss. 260, are persuasive for a different construction. There the law was as to alimony in a suit by the wife for her support, and the law, as it then existed, was that alimony was allowed

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as an incident of some other suit, like a divorce suit; but the court, in an opinion of great reason and strength, held that the suit would lie, even though no other suit was pending.

The most powerful and pressing considerations, it occurs to me, present themselves in favor of a like construction here. Why should the husband escape the duty to support his children in case no divorce is asked, and be compelled to do so where a divorce is asked? Would not such construction encourage, rather than discourage, divorce? And is it not the settled public policy to discourage divorce, and encourage the discharge of legal duty?

Section 6188, Hemingway's Code (section 3571, Code of 1906), reads as follows:

"The father and grandfather, the mother and grandmother, and brothers and sisters, and the descendants of any pauper not able to work, as the board of supervisors shall direct, shall, at their own charge, relieve and maintain such pauper; and, in case of refusal, shall forfeit and pay the county the sum of eight dollars per month for each month they may so refuse, to be recovered in the name of the county; and shall be liable to any person who supplies such poor relative, if abandoned, with necessaries, not exceeding said sum per month."

Does this section provide an exclusive remedy in case no divorce proceedings are pending? Clearly not. It will be noted that the legal duty is clearly fixed upon the father to support and maintain his children at his own expense. If he does not discharge this legal duty, the board of supervisors may, if the child is maintained by the county, sue him for as much as eight dollars per month, and no more. Any private person furnishing such child support cannot recover more than eight dollars per month. If this is the exclusive remedy, the child would starve, or its living expense would have

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to be made up by the public, even though the heartless father might have millions of dollars' worth of property. No person would, in this day of high cost of living, furnish a child enough to live on when he would be limited to eight dollars per month recovery against the father under this statute. The absurdity of so holding is evident. The law-making power never intended to so limit the amount that a parent should furnish, nor relieve him of any duty in the premises. What is the criminal law referred to in the majority opinion, by which this parental duty may be enforced and the child protected? Section 805, Hemingway's Code (section 1078, Code of 1906), provides:

"If the father or mother of any child under the age of six years, or any other person having the lawful custody of such child, or to whom such child shall have been confided, shall expose such child in any highways, street, field, house, outhouse or elsewhere, with intent wholly to abandon it, such person shall, upon conviction, be punished by imprisonment in the penitentiary not more than seven years, or in the county jail not more than one year."

It will be seen that this section is very limited in its scope. It does not apply at all to children over six years of age, and is then limited to particular acts, and does not apply to mere neglect. If that is the remedy for helpless children, God have mercy on them!

What about vagrancy proceeding? Section 5055, Code of 1906 (section 3332, Hemingway's Code), defines who are vagrants, and paragraph (k) of this section is the one that provides that: "Every person who shall abandon his wife or family, without just cause, leaving her or them without support, or in danger of becoming a public charge."

And paragraph (m) provides: "All persons who are able to work and do not work, but hire out their minor

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children or allow them to be hired out, and live upon their wages."

These are the only provisions pertinent to the suit before us. The proceedings for dealing with vagrants are contained in section 3335, Hemingway's Code (section 5058, Code of 1906) and section 3338, Hemingway's Code (section 5061, Code of 1906).

It was provided in section 3335, Hemingway's Code, that whenever any person is arrested on a charge of vagrancy he shall be carried before a justice of the peace, and on satisfactory evidence of being a vagrant that the justice of the peace shall commit such person to jail for not less than ten nor more than thirty days, and that such person so committed shall serve his sentence, unless he shall give bond with sufficient surety for future industry and good conduct for a period of one year, and that such bond, if given, may be put in suit, and that whenever the bond so taken be forfeited there shall be no recovery less than the face value of the bond, unless the vagrant shall be delivered up to the circuit court for future trial, in which case the court may limit the amount of recovery on the bond to the cost of suit and a penalty of fifty dollars. This bond nowhere provides for the recovery thereon by the infant or the wife. The suit must be in the name of the state, and it provides no support whatever for the dependents of the vagrant. If the alleged vagrant refuses to give bond, he may be imprisoned for thirty days, and no longer. Clearly this proceeding affords no certainty of relief for the dependents of the vagrant. Section 3338, Hemingway's Code (section 5061, Code of 1906), provides for a second conviction, and provides that in such case the vagrant shall be committed to jail jail for not less than ninety days nor more than six months, and shall serve such sentence, and not be liberated from such sentence by payment for the time required to be served by such sentence. This section

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clearly makes no provisions for the children and dependents of the vagrant.

So we say that these criminal and vagrant sections do not provide for their support. In 1 Corpus Juris, p. 985, section 93, it is said:

"The violation of a right, as defined or recognized by the substantive law, constitutes a wrong and it has long been a settled pjrinciple and maxim of the law that for every right or as otherwise, and perhaps more accurately, stated, for every wrong, or for the vindication or violation of every right, there is a remedy, or, in other words, that wherever the law recognizes a right it gives a remedy to enforce it, or to redress its violation, and in the application of this principle it is immaterial whether the right is a common-law right or exists by virtue of statute. Right and remedy are reciprocal, and to deny the remedy is, in substance, to deny the right."

For essentials of an action, see 1 Corpus Juris, p. 927, and page 935, section 28. At page 986, same volume (section 95), it is stated by this same authority, under heading "Statutory Rights:"

"The rule that wherever the law recognizes a right it gives a remedy applies to statutory as well as to common-law rights; and so wherever a statute creates a new right or duty, and does not prescribe any particular remedy for its enforcement, the party entitled to the benefit of the statute may resort to any existing remedy which will afford adequate and proper redress, whether it be a common-law or a statutory remedy."

Section 96, under the same chapter, under heading "Framing New Remedies," says:

"In order to afford a remedy for every wrong it became necessary during the formative period of the common-law actions, as new cases arose under recognized principles, to frame new writs, where none ap-

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propriate to the case could be found. These writs were formerly issued out of chancery and directed to the common-law courts; but it is now well recognized that the court in whch an action is brought may, in order to prevent a failure of justice, or to enforce a recognized principle of law, devise or adopt such new remedy or mode of procedure as the case may require, and that it is its duty to do so; but a new remedy or mode of procedure should not be resorted to, when there is an appropriate and adequate remedy already known to the law."

In section 99, p. 987, under heading "Nature and Form of Remedy," it is said:

"The rule that there shall be a remedy for the enforcement of every right, although it be a new right created by statute, does not have reference to any one particular remedy, but to such form of remedy as is appropriate to the nature of the particular case; and in some cases there may be more than one appropriate remedy."

In section 100, p. 986, of the same authority, under heading "Statutory Remedies," it is said:

"It is competent for the legislature to provide a remedy in cases where none existed at common-law, or in creating a new right to prescribe the remedy by which it is to be enforced, and limit jurisdiction of it to a particular tribunal, or to provide new remedies for pre-existing rights, and make such new remedies exclusive. Where a statutory remedy is prescribed for a particular purpose, it will be limited accordingly and cannot be used for other purposes, and in pursuing a statutory remedy the proceedings must conform to the provisions of the statute."

In section 101, same authority, at pages 988, 989, under heading "Cumulative or Exclusive Remedies," it says:

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"Unless governed by some general statutory provisions, the question as to whether a statutory remedy is exclusive or merely cumulative depends primarily upon the intention of the legislature, as shown by a construction of the statute prescribing the remedy. The question is ordinarily determined according to whether the remedy is given for the enforcement of a new right created by the statute, or is merely a new remedy for a pre-existing right; but while, unless a contrary intention appears, the remedy will in the former case be construed as exclusive, and in the latter as merely cumulative, this distinction is not in all cases controlling."

In section 102, pp. 989, 990, same authority, under heading "New Right Created with Remedy," it says:

"Where a statute creates a new right, and also provides a remedy for its enforcement, it is ordinarily held that such remedy is exclusive. This rule seems to have been first laid down with reference to remedies under criminal and penal statutes; but it applies equally to civil actions of a personal nature, and where the statute providing such a remedy confers jurisdiction thereof upon a particular court or tribunal, such jurisdiction, as well as the remedy, is exclusive. The rule is not, however, of universal application, particularly in the case of statutes which are not penal, for it is based merely upon a presumed prohibition of other remedies and will yield where a contrary intention appears."

In section 103, p. 999, under heading "New remedy for Pre-existing Right," this authority says:

"Where a statute providing a remedy does not create a new right but merely provides a new remedy for a pre-existing right, it is ordinarily held that such remedy is not exclusive, but merely cumulative, whether the right is one previously enforceable at common law, or by virtue of some other statute or constitutional

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provision, and whether it was previously enforceable at law or in equity, and notwithstanding the new remedy may be preferable to or more efficient than the old."

In section 105, p. 991, under heading "Adequacy of Statutory Remedy," this authority says:

"The rule that a new remedy for a pre-existing right will not be regarded as exclusive is particularly applicable where such new remedy is not an adequate one."

Testing the present case by these rulings, we are bound to conclude, it seems to me, that these penal and criminal statutes do not provide an exclusive remedy for the enforcement of the rights of children to support by their parents. The obligation existed independent of the statute.

In 20 R. C. L. p. 622, under heading "Liabilities of Father," it is said:

"It has already been pointed out that correlative to the father's right to the custody control and earnings of his minor child is his duty to support such child. This duty is recognized and discharged even by the higher orders of the animal world and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as of law. And yet it was held in some early American cases supported by eminent English authority that 'there is no legal obligation on a parent to maintain his child, unless by force of some statute. But this doctrine admitted to seem startling and opposed to the innate sence of justice by the court which gave to it it first American support has been repudiated by the great majority of American courts. A father of sufficient ability is bound to support his minor child, though the latter has an estate of his own."

And at page 623 the same authority said:

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"The practical difficult which undoubtedly led some courts to hold that the father's duty of support was only a moral duty is as to the method of enforcement. The very similar duty of the husband to support his wife is easily enforced by imputing to her an agency to procure necessaries on his credit, if he leaves her destitute; but in the case of the infant he is legally incapable to contract, and in most cases actually unable to contract with wisdom and prudence."

While a person who furnishes an infant may recover from the father in this state to the extent of eight dollars a month, "and no more," he is under no obligation to do so, especially when he might have trouble in collecting from the father. At page 625, 20 R. C. L., it is said:

"But if a father abandons his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance. The principle of the distinction is that in one case the father is blameless and in the other blamable. Whether, from all the circumstances, authority from the father should be imputed to the child or to a third person to procure or to furnish necessaries on the father's credit is a question of fact for the jury. If a father permits his child to live with its mother, her adultery is no bar to an action by her to recover for support furnished to the child."

See, also, *Van Valkinburgh* v. *Watson,* 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Schouler's Domestic Relations, p.. 327-331; *Johnson* v. *Johnson,* 2 Hill, Ch. (S. C.) 277, 29 Am. Dec. 72; *Owen* v. *White,* 5 Port. (Ala.) 435, 30 Am. Dec. 527; *Ward* v. *Goodrich,* 34 Colo. 369, 82 Pac. 701, 2 L. R. A. (N. S.) 201, 114 Am. St. Rep. 167; *Alvey* v. *Hartwig,* 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678, 14 Ann. Cas. 259; *Spencer* v. *Spencer,* 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, and case note; *Graham* v. *Graham,* 38 Colo. 453, 88

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Pac. 825, L. R. A. (N. S.) 1270, 12 Ann. Cas. 138, and case note; *Lukowski* v. *Lukowski,* 108 Mo. App. 204, 83 S. W. 274; *Biffle* v. *Pullan,* 114 Mo. 50, 21 S. W. 450; *In re Scarritt,* 76 Mo. 584; *Zilley* v. *Dunwiddie,* 98 Wis., 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820; *Watts* v. *Smylie,* 116 Miss. 12, 76 So. 684 (where this court said the husband was charged by law with the child's support and after his death it was the moral and legal duty of the mother to support it). See, also, *Dick* v. *Grisson,* Freem. Ch. 428; 5 Wait's Actions and Defenses, p. 50 et seq.; Id., vol. 8, p. 971; *Gilley* v. *Gilley,* 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; *National Valley Bank* v. *Hancock,* 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933; *De Brauwere* v. *De Brauwere,* 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508; *Rogers* v. *Rogers,* 93 Kan. 114, 143 Pac. 140, L. R. A. 115A, 1137; *Pretzinger* v. *Pretzinger,* 45 Ohio St. 452, 15 N. E. 147, 4 Am. St. Rep. 542; *Graham* v. *Graham,* 38 Colo. 453, 88 Pac. 852, L. R. A. (N. S.) 1270, 12 Ann. Cas. 137, and case note; *Cory* v. *Cook,* 24 R. I. 421, 424, 53 Atl. 315.

The majority opinion concedes that it is the legal as well as the moral duty of the father to support his minor children, but concludes that there is no remedy for the enforcement of this legal duty at the suit of the child. In *Garland* v. *Garland,* 50 Miss. 694, this court laid down the following general rule pertaining to equity jurisdiction and procedure:

"Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adquate, and complete remedy at law. Here there is no such process as supplicavit, nor a distinct proceeding for the restitution of the conjugal relation. If a wife is abandoned by her husband without means of support, a bill in equity will lie to compel the husband

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to support the wife without asking for a decree of divorce."

This rule has been cited with approval in the following cases: *Dewees* v. *Dewees,* 55 Miss. 319; *Verner* v. *Verner,* 62 Miss. 263; *McFarland* v. *McFarland,* 64 Miss. 449, 1 So. 508; *Scott* v. *Scott,* 73 Miss. 580, 19 So. 589; *Moseley* v. *Larson,* 86 Miss. 294, 38 So. 234; *Ross* v. *Ross,* 89 Miss. 66, 42 So. 383.

Prior to this decision the authorities had treated alimony for the wife as an incident to some suit, such as divorce, and it was earnestly contended that, as there was no statute granting the suit without the pendency of a divorce, the relief could not be granted. In *Garland* v. *Garland,* 50 Miss. 711, 712, the court quoted from Story's Equity Jurisprudence, section 1423a, with approval as follows:

"'In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may, in all cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished it were generally adopted.' No sufficient reason can be offered in answer to the broad proposition of Mr. Story, and the objector must rely upon the technical fact that it has not obtained in England. *Purcell* v. *Purcell,* 4 Hen. & Mun. (Va.) 507, presented three questions—marriage, desertion, and the right of the wife to a separate maintenuance. The two first averments were established. As to the third the chancellor said: I hold, that in every well-regulated government there must exist a power affording a remedy when the law affords none, and this peculiarly belongs to a court of equity;

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and as husband and wife are considered as one person in law, it is evident that in this case the law can afford no remedy, which is universally admitted to be a sufficient ground to give this court jurisdiction, and therefore it must entertain the bill, if there be sufficient proof of the marriage.' In the opening of his opinion, the chancellor said: 'I shall leave the clashing of the English judges to be reconciled among themselves, and take up the question upon first principles.' The marriage was sustained and the prayer for a separate maintenance granted. The decree required an annual payment by the husband to the wife 'until he should restore her to the comforts of her bed and board, and give satisfactory assurances for her enjoyment thereof.' This decree was enforced by committing the husband to prison for neglecting compliance. He purged himself of the contempt by paying to his wife the amount due and in arear and giving security for his future performance of the decree.

"Precisely the same question under consideration was before the courts of South Carolina in the case of *Prather* v. *Prather,* 4 Desaus. 33. The opinion is a searching review of the English decisions, and a very emphatic assertion of the equity of the rule, which, Story says, 'it might be wished it were generally adopted.' The court in that case observe: 'It might be sufficient to say that, as there have been cases on both sides of the question, ... I should feel myself at liberty to select those cases for my guide which applied to the circumstances of this country, and would best promote the purposes of justice. . . . The subject has been discussed, and the court has decreed that the wife should have a separate estate from her husband, in the case of ill usage, and a consequent separation or desertion by the husband, though no agreement for a separate maintenance and no divorce. . . . I allude to several cases which were decided in this court some

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years since, expressly on the ground that no other tribunal could give redress, and that it would be unseemly and highly mischievious if this court did not interfere," See also, 2 Desaus. 198, and cases in South Carolina therein referred to."

In 50 Miss. 713, the court also quote the Supreme Court of Alabama as follows:

"The supreme court of Alabama, in *Glover* v. *Glover*, 16 Ala. 440, use this language: 'No one will deny but that the husband is bound by the strongest obligations, resulting not alone from the contract of marriage, but founded upon the highest moral consideration, to support his wife. And if it be true that the law, as well as enlightened conscience, creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation then indeeed has one class of cases been found which falsifies the boasted maxim "that for every wrong there is a remedy, and for every injustice, an adequate and salutary relief.' " And after adverting to the disagreements of the English Chancellor, the court also says: 'So stands the law in England, and since her learned Chancellors have not been able to reconcile their own decisions, we feel that we shall not be wanting in respect for them in adopting a rule of decision for ourselves, which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based.' "

In 50 Miss. 714 our court, quoting from the Kentucky court in *Butler* v. *Butler*, 4 Litt. 202:

" 'But in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy, where the conscience and the law acknowledge a right, but know no remedy. Why, then, should the chancellor shrink at this case and refuse a remedy? It is evident that this arose in England for fear of intruding upon

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the ground occupied by the ecclesiastical courts.' And in this quotation the whole case at bar is embraced. With us, marriage rests in contract, and the obligation is both to the wife and to society. That the remedy at law, in case of a breach of this contract, is neither full, adequate, nor complete, is plain to ordinary experience. The law's delays are proverbial. The credit of a man, stubbornly determined not to support his wife, will not feed the hungry nor clothe the naked. A man might be worth a large fortune, yet so situated as to defy judgment and execution. The credit of one so disposed would avail nothing in the market in the way of procuring supplies, as merchants will not part with their goods upon such uncertain security."

In 50 Miss. 715, 716, the court said:

"Support of the wife is the legal duty of the husband. The wife has a right to demand it; but, as her remedy, when this right is denied, is not full, adequate and complete at law, equity ought to enforce it. In abandoning the wife without good cause and refusing to support her, the husband violates a legal duty and commits a breach of contract, which entitles the wife to redress, either by divorce, or to the enforcement of the marriage contract by compelling restitution of conjugal rights to the extent of maintenance, at her option. If she chooses the latter she ought not to be starved into the former, for that would force her to abandon the marriage contract against her will."

In the subsequent case of *Verner* v. *Verner*, 62 Miss. 263, the court again held that the wife could file suit for alimony without suit for divorce.

The case of *Johns et al.* v. *Williams & Black*, 66 Miss. 350, 6 So. 207, was a suit by complainants against their mother and Williams & Black. It was alleged that the complainants were minors, except one of them, and that they had not a guardian, and the land in controversy was conveyed in and for their use, and the suit was to

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enforce the trust against Williams & Black and their mother. Williams & Black demurred to the bill, and the chancellor sustained the demurrer and dismissed the bill. This court reversed, for proper relief to be granted.

In *Williams* v. *Duncan,* 44 Miss. 375, the court said:

"If there were no other reason, the infancy of the complainants brings the case within the jurisdiction of a court of equity."

In *Johns* v. *Smith,* 56 Miss. 727, this court held that the chancery court had full jurisdiction over minors and their property, which must be exercised whenever nonaction would result prejudicially to the minor, and if there is no guardian the court must act without one.

In *Hurt* v. *So. Ry.,* 40 Miss, 391, it was held that an infant could sue in a court of law by next friend. See also, 22 Cyc. 627, where it is said that infants may sue at law or in equity.

Minors are peculiarly wards of the chancery court, and it was held in *Price* v. *Crone,* 44 Miss. 571, that it is the duty of the chancellor to protect the interest of minors whether the proper defense be made or not; and for this purpose they look to the record in all its parts, and, of his own motion, give to the infant the benefit of all objections and exception as fully as if specially pleaded. The infant can waive none of its rights.

In Story's Equity Jurisprudence (10 Ed.) section 1341, at page 595, it is said:

"The jurisdiction of the court of chancery extends to the care of the person of the infant, so far as necessary for his protection and education; and as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. It is upon the former ground, principally, that is to say, for the due protection and

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education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children. For although, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed, whenever (for example) it is found that a father is guilty of gross ill treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, . . . the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education."

In *Leibold* v. *Leibold,* 158 Ind. 60, 62 N. E. 627, it was held that suit would lie in equity against the father for the support of his minor children, independent of any statute. In that case the suit was filed by the wife for the support and custody of their minor children; the only distinction between that and this being that this suit is merely for the support without any suit as to custody. The proceeding did not conform to a statutory proceeding in Indiana. At page 61 of 158 Ind. (62 N. E. 627), the court said:

"This proceeding, however, was not brought under the act of 1881, nor does the sufficiency of said second paragraph depend upon that act. The power of a court of chancery to control not only the estate, but the person and custody, of infants, is well settled"—citing 2 Story's Eq. (13 Ed.), sections 1341, 1341a, 1345; 1346; 3 Pomeroy's Eq. Jur. (2 Ed.), section 1307; *Cowls* v. *Cowls,* 8 Ill. (3 Gilman) 435, 44 Am. Dec. 708.

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In 3 Pomeroy's Eq. Jur. (2 Ed.), section 1307, it is said: "In addition to its power to appoint guardians, the court of equity will also exercise its jurisdiction, in a proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the person of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. By the common law, as well as by the law of nature, the father is the natural guardian of his infant children. It is not only the father's right, but his imperative duty, to have custody of the persons of the infant children, and to educate and train them so as to promote their future well-being as members of society. The equitable jurisdiction over the persons of infants is based upon this parental duty, and is an indirect means of enforcing it by furnishing a remedy for its violation. The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court, and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants, and remove them from the custody and control of their father or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles, or when the parent is neglecting their education suitable for their condition in life, or is endangering their property, or is guilty of ill treatment or cruelty towards them."

In discussing the jurisdiction of the Chancery court pertaining to its control over minors, Lord ELDON, in English chancery, in the case of *Wellesley* v. *Duke of Beaufort,* 2 Russell, 23. says:

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"Wherever the power of law rests with respect to the protection of children, it is clear that it ought to exist somewhere; if it be not in this court, where does it exist? Is it an eligible thing that children of all ranks should be placed in this situation—that they shall be in the custody of the father, although, looking at the *quantum* of allowance which the law can compel the father to provide for them, they may be regarded as in a state little better than that of starvation? The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in this his majesty's court for centuries past. Having thus shortly alluded to some of the cases, and referring to the cases themselves for a more large exposition of the grounds upon which this jurisdiction stands, I repeat that I find myself in this seat humbly representing his majesty, and bound by the settled law of the land. I cannot now retire from the discharge of this duty; I dare not violate the principles which grow out of the practice of the court. My duty is to apply those principles honestly, to look diligently to all the circumstances of the case, and, with judicial integrity (by which must be always meant an integrity of the purest nature), to determine manfully, and manfully to declare what my opinion is."

Again, at star page 28 it is said: "I was anxious upon that point for another reason, namely, because, reflecting upon the nature of the jurisdiction as connected with property, it appears to me that whilst the court looks at the duties of the father, it considers those duties as duties that impose upon him thus much —that if he be himself of ability to maintain the children (be their fortunes what they may), and to provide for them according to their expectations it says, 'You shall provide for them out of your own means, and not encroach upon the property of the

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children.' What does the court do further with respect to the maintenance of children in a certain class of society? Can any court of law do that which this court is in the constant habit of doing, and of doing most usefully for families and the public? In many great families, the eldest infant is in the possession of a large property; the young infants have some little property; and in such a case the court does not measure the duty of maintaining the eldest child by looking at him only, but it considers that it is for his interest that his brothers and sisters should be brought up in respectable stations; and it says, 'We will go the length of giving them maintenance, or a part of maintenance, out of his provision, as a part of the maintenance made for him, though to be applied to them,' and upon this ground: That it is for his benefit, not that this portion of his fortune should be saved, but that it should be applied to bringing up his brothers and sisters to such situations as to reflect honor upon him."

In the case of *Prather, by next friend* v. *Prather,* 4 Desaus. 33, the South Carolina court was called upon to deal with a situation analogous to the present case. Bill was filed in this case by a wife who lived separate from her husband to recover alimony on the ground of ill usage and being turned away by her husband. The defendant demurred to the bill, and the court held that it had jurisdiction and made allowance in proportion to the husband's fortune. At page 35 it is said, after setting out the allegations of the bill:

"This bill makes a very shocking case, outrageous to humanity, and disgraceful to civil society. The question then arises: Is there no remedy for such enormous evils? and if there is, where is it to be had? The delicate trust is committed, in the country from whence ecclesiastical courts are the tribunals to whom this we have borrowed our jurisprudence, though in particular cases the court of equity has interposed to give

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relief, as shall be more particularly noticed hereafter. But there are no ecclesiastical courts in this country, which can give relief. It is equally clear that the courts of law cannot give any relief. The nature and constitution of those courts, and their forms of proceeding, render it impossible for them to interfere in such case. We are brought, then, to this conclusion—either that these gross injuries must pass without redress, or this court must interpose and give relief. It is shocking to think that such conduct, so inhuman in itself, so injurious to innocent and helpless women, and so mischievous to society, should pass unheeded and unchecked in a civilized country. It is the boast of our jurisprudence that for every wrong there is a remedy, and for every injustice an adequate and salutary redress. But this would be a vain and empty boast, if for such a case as this there was no remedy."

And at page 38, discussing the wife's right, the court said:

"She acquires by her marriage, in return for the comfort she brings, the right to maintenance and support, and to a participation in the enjoyment of her husband's property, according to his degree and situation in life, while she demeans herself correctly; and this right she may exercise in an irregular, unsettled, vexatious manner, by running in debt for necessaries, upon his deserting her, which he would be compelled to pay. But this is a very uncertain method, and full of inconvenience and productive of constant litigation. Few will trust a woman under such circumstances, when they are sure of not being paid without suits, and the measure is entirely uncertain."

The same may be said with increased emphasis of the condition of the helpless children in the present case. Few would be willing to trust them with a sufficiency for their comfort, if they must depend upon the result of the suit and the consequent uncertainty of the

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amount to be received, or of receiving anything at all. At page 39 of the case of *Prather* v. *Prather,* in 4 Desaus. (S. C.) *supra,* the court said:

"The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases, as in executory agreements. A court of equity will compel them to be carried into strict execution (unless where it is improper or impossible), instead of giving damages for nonperformance. So, too, in questions that may be tried at law in a great multiplicity of actions. A court of equity assumes a jurisdiction to prevent the expense and vexation of endless litigation and suits. Now, if the court of equity has concurrent jurisdiction with the courts of law, merely because it can give more ample or complete relief with less litigation, surely it follows that it will be justifiable to interfere where the courts of law can give no relief at all, as is acknowledged in the case under consideration."

In most of the cases dealing with this subject the suit has been brought by the wife, and generally for moneys or credits expended by her for the support of the children. But manifestly the right of action, whoever may bring it, is rooted in the legal obligation of the father for their support, and it is not a right of the wife as such, but it is the right of the children, and the judgment is made to her as the trustee for their benefit. Many of the cases already cited furnish ample authority for the procedure, and the authorities in this state, which I have already cited, show that children may sue for any right which they have, at least in the equity court.

I proceed now to a consideration of the authorities cited in the majority opinion, the principal of which is *Huke* v. *Huke,* 44 Mo. App. 308. The basis of this decision, and the only theory upon which it can be

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upheld on legal reasoning, is that the duty of the father to support his child is a mere moral obligation, as distinguished from a legal obligation. The court said (44 Mo. App. 312):

"By the common law of England a father is not bound to support his infant child, in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable, as upon an implied contract, to a stranger who furnishes necessaries for the support of his infant child."

If this statement were true, and if there were no legal obligation on the part of the father to support the child, then the conclusion of the majority would be sound. As is shown above, the overwhelming weight of authority is against this announcement, and as the majority opinion confesses that there is a legal obligation on the part of the father to support the child, this authority does not sustain the reasoning of that opinion. At pages 313, 314, of 44 Mo. App. the Missouri Court of Appeals said:

"But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the Chancellor of England had, in virtue of a delegated authority from the king as *parens patriæ,* or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice regal power over the custody and education of children, in virtue of a delegated authority from the king as *parens patriæ.*"

It is settled that a court of equity of this country and of this state has the power that a court of chancery in England had, and represents the state as *parens patriæ,* exercising the same jurisdiction that the English chan-

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cery courts exercise. The judge delivering the opinion in *Huke* v. *Huke,* 44 Mo. App. at page 314, after the above recital, said:

"In the exercise of that jurisdiction it will appear that the English Court of Chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries—in France and America—and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England."

It will be seen from a careful reading of this opinion that the decision would have been otherwise, had the court recognized the duty of a father as a legal duty, instead of a moral duty. There are only a few states in America that agree that a duty is not a legal duty, and Mississippi is not one of those that consider it a mere moral duty. Legal and moral obligations frequently co-exist. In such cases the courts will enforce the obligation, and it is a legal duty to enforce them, but the courts will not enforce a mere moral duty. This case of *Huke* v. *Huke* has been cited by many text-books for the proposition that a child cannot sue a parent, and the text-writers in some of the courts have cited it without referring to the reason underlying the decision, and without pointing out the different results which will flow from a recognition of the duty as a legal one. This is the only case which I have found directly holding that proposition. It ought not to prevail in any jurisdiction recognizing the legal obligation of the parent to support the child. The other cases referred to in the majority opinion are not applicable to this suit.

The case of *Alling* v. *Alling,* 52 N. J. Eq. 92 et seq., 27 Atl. 655, cited in the majority opinion, in which it was said that a court of chancery has no jurisdiction to compel a parent to support an infant child was a suit brought by the mother against her only child and

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daughter, alleging that the mother has been a widow since 1876, and that the daughter was born in 1874. The claim was for support, maintenance, and education furnished by complainant from the time of the death of her husband and until date, and for an order for allowance of support during the minority of the daughter out of the fortune of the infant. The daughter had recently come into a small fortune from two sources, namely, a part of her father's estate, which is in her mother's hands as administratrix, and a part from an uncle in the hands of her guardian. The funds coming from her father were vested in him before his death under the will of his father, the grandfather of defendant, but were subject to a life estate in the widow of the testator, who died in 1889. Under the will the executor paid the complainant as administratrix about eleven thousand, five hundred dollars. Of this sum the complainant is entitled to one-third, leaving her daughter, the defendant, less than eight thousand dollars. The other fund from her uncle amounted to six thousand, eight hundred and fifty dollars. At page 99 of 52 N. J. Eq., and page 658 of 27 Atl. of the opinion, it is said in reference to the obligation of parents to support their children:

"'By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved; and thus the children will have a perfect right of receiving maintenance from their parents.' This duty and this obligation have been variously modified by the positive laws of civilized countries, but fully recognized by all. Connected with this obligation of maintenance there is a parental privilege. The parant is entitled to the custody and care of the child which he sustains, and to such service as it can render, and he has a right to exercise his own discre-

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tion in determining the fitness and necessity of the allowances to be made, and of the support to be furnished to his children, for which he is to be made chargeable."

At page 110, 52 N. J. Eq., and page 662 of 27 Atl., it is said:

"In looking over the account, I find that the child was maintained in a style which, in my judgment, was quite beyond her pecuniary expectations, and I cannot approve its payment out of her fortune. If the mother chose to support her in such style, I think she must pay a part of the expense from her own income, which was nearly three times that of the child."

The case of *Finch* v. *Finch,* 22 Conn. 411, referred to in the majority opinion, is a suit by a wife against her husband on a book debt, after divorce, in which he had been awarded the custody of the children. The suit was for the entire support and education of such children after such decree has been granted. The court held that the entire account could not be recovered. The majority opinion, at page 421, said:

"It seems to a majority of the court that the sole obligation of supporting the children, which was thrown upon the husband and father by the state of coverture, is essentially changed, or modified, by the dissolution of the marriage; and now their pecuniary condition and ability may be equal or otherwise. The mother may have ample means, and the father none; and in such case, surely, it would be inequitable to charge the father with the entire maintenance of the children, while they remain in their mother's service, and under her exclusive control; and we do not believe the common law imposes any such obligation."

Two of the judges dissented. It is clear from this case that it is not in point here, and does not sustain the holding of the majority.

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In the case of *Hewlett* v. *George, Executor,* 68 Miss. 703, 9 So. 885, 13 L. R. A. 682, Judge WOODS, of this court, said:

"The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

This utterance, as applied to the facts of that case, is a correct pronouncement. The facts show a condition that was very grave facing the parents to control their minor daughter, who was guilty of practices that would bring irreparable wrong and shame to her family. She was committed to an insane asylum, and most people would sympathize with the family in the step taken. I apprehend that this court would never hold that a suit by a child against a parent for a permanent injury, willfully and maliciously inflicted, would not lie.

I have a great regard for the distinguished judge who wrote the opinion in *Hewlett* v. *George, Executor,* and I cannot bring my mind to believe that he and his distinguished associates would have held that in no condition could a minor child sue a parent. I think that the true rule is that the parent has a right to exercise a reasonable restraint and inflict chastisement for the purpose of correcting a child, and in the discharge of his duties, while acting within the limits of reason, he has the discretion as to what chastisement and the kind of support he will furnish, and is not to be required to maintain his children in luxury and ease even though he may have ample means to do so, and that the parent is the judge, within reasonable

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limits, as to the amount of chastisement that he will inflict, and is not responsible for an error in judgment so long as the facts bring the case within the limits within which reasonable men may differ. The court is not, in such case to substitute its judgment for that of the parent; but when the father refuses to perform his duties, and makes no effort to supply the needs of his children, then the court, acting as the *parens patriæ* for the state, looking out for the child's welfare, will, and of right ought to, compel him to do so. The language in *Hewlett* v. *George* went beyond the calls of the case.

The state will not rely entirely upon criminal law for the protection of children from neglect and maltreatment by parents for several reasons: First, it is wholly inadequate for that purpose. The children are under the control and restraint of the parents, and have not sufficient intelligence and opportunity to set the criminal law in motion or to attend and prosecute. It is contrary to human nature for them to want to prosecute. It accomplishes nothing for the child, as the placing of parents in jail does not clothe the body, nor satiate the pangs of hunger, nor nourish the body. It does not protect the body from the bleak bites of the wintry winds, nor stay the pangs of starvation. If the parent has to pay a fine, his ability is diminished to that extent. If he is placed in jail, he is not able personally to look after his children, and in either event his resentment is aroused and his anger is enkindled, and the child will suffer more, instead of less, by trying such remedies. If the remedy at law is inadequate, equity ought to take jurisdiction, and it is one of the maxims both of the common law and of the equity court that no wrong will be allowed without a remedy. See Broom's Legal Maxims, pp. 191-195; 16 Cyc. 30, 133.

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The majority quotes from 29 Cyc. 1614, and on page 1663, and says:

"It is pointed out that 'actions by children against their parents are not to be encouraged, . . . and a minor child has no right of action against a parent for the tort of the latter.'"

The majority fails to quote that part of Cyc. which quotes from the case of *Bird* v. *Black,* 5 La. Ann. 189, where the court said:

"Suits of children against parents are not to be encouraged, unless to redress clear and palpable injustice."

I heartily concur in the opinion from Louisiana on the facts there presented.

I cannot concur in the holding that the repose of society would be adversely affected by maintaining the suit in the present case. Any society that can consent to see children neglected by able parents, and whose repose would not be more disturbed by seeing children starved, maimed, and brutally handled, than it would be by seeing the law make the parent fulfill his duties and obligations to his child, ought not to be tolerated at all. What philosophy is this now promulgated which say that suits in chancery will disturb society when criminal prosecutions of parents by children will be when the helpless children are allowed to go hungry and unclothed, their vitality so lowered by starvation and exposure as to make them invalids, unable to perform the functions of citizenship, but, on the contrary, make them a burden, and perhaps a menace, to society? If there be such society in existence it ought to be kicked off the earth, and forced to do its reposing in the abysmal pits of Gehenna, where children do not go.

HOLDEN, J., concurs.

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FOOTE v. DICKSON ET AL.

[83 South. 145, In Banc. No. 2850.]

EQUITY. *Remedy at law after alteration of one of joint signatures.*

The holder and lender on a note, signed by a drug company through its president, and by an individual, had an adequate remedy at law on the note as signed and delivered to him by the president of the company, even though the individual signer could defeat recovery, because he had signed the note jointly with the president of the drug company as an individual only, while the president had written in both his signature, the name of the drug company and after the name the abbreviation "pres," this fact not affording the holder a remedy in equity, against the individual signer.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by F. W. Foote against J. M. Ware and Benjamin A. Dickson. From a decree dismissing the bill as to defendant, Ware, plaintiff appeals.

The facts are fully stated in the opinion of the court.

J. N. Flowers and *E. B. Cooper,* for appellant.

We say that under the facts of this case as disclosed by the bill of complaint that there does not exist for the appellant that full, adequate and complete remedy at law that must exist before a court of equity will refuse its aid. In what respect must the remedy be full, adequate and complete we submit the following authorities as showing the extent to which the courts go in holding what is necessary to constitute an adequate remedy.

In Cyc., page 41, we find the following: "The existence of a remedy at law does not deprive equity

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of jurisdiction unless such remedy be adequate. By this is meant that it must be clear, complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' "

And then again on page 42 it is said: "The greater promptness of the remedy in equity is often given as a reason for sustaining its jurisdiction. This does not mean promptness in administration, depending on the state of the calendar nor does it mean that the progress of a suit in equity is inherently more speedy, for on the contrary such progress has been generally and notoriously slow. It relates rather to directness of remedy and the avoidance of circuity of action and multiplicity of suits."

And further on page 43 you will find where a legal remedy is available but would afford only a partial protection of plaintiff's entire right or would not entirely adjust the rights of the parties, such remedy is incomplete, and for that reason equity will interpose.

We submit that the foregoing statements of what will constitute a full, adequate, and complete remedy at law are correct in every particular and is applied to this case to show that the appellant had no full, complete and adequate remedy at law.

If we are remitted to a court of law in a suit on the note against Dr. Ware the nature of his defense to the suit might defeat it and we would thereupon be required to enter suit against Dickson because of his fraudulent acts and his fraudulent representation when the note was delivered to appellant. Two suits would be necessary. The subject-matter of these suits would grow out of the same transaction. We have simply asked the court by the bill in this case to render such decree as the facts of the case justify. We say that Dr. Ware is liable to us or that Mr. Dickson is liable to us. Under the facts of this case we asked the

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chancery court to avoid circuity of action and to settle the rights of the parties in this one particular suit. This is one of the functions of a court of equity and has been recognized from time immemorial. We say that while we might by two separate suits, one of which must necessarily await the determination of the other, accomplish the results we have asked for. That may be true, but a court of equity does not require us to be without a remedy at law before it will extend its aid. The remedy at law must be full, complete and adequate and such is not true in this case. And as shown in the quotations from Cyc. the promptness of the remedy enters into the questions of the adequacy of the remedy. In our case the remedy at law is inadequate. To remit us to a court of law would be in effect remitting us to two law suits, and we must await the termination of the one against Dr. Ware and its unsuccessful conclusion before any suit against the other appellee can be established. We say and submit that our remedy is incomplete and inadequate in a court of law for the reasons indicated above and submit that the cause should be reversed and remanded.

Ridgeway, Enoch & Ridgeway, for appellee.

We are familiar with the two grounds of equity jurisdiction, to-wit: (1) the avoidance of a multiplicity of suits, and (2) the avoidance of a circuity of action. But we submit that appellant does not present a case coming within either ground. The fact that appellee Ware might successfully defend a suit at law on the note by showing that he did not sign the note of the Cadenhead Drug Company, does not give the chancery court jurisdiction of a suit on the note against appellee just because, forsooth, another might in that event be liable to the appellant for the amount of the note for fraudu-

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lently representing that appellee did sign the note of said company. We do not understand that the above-mentioned grounds of equity jurisdiction are involved in a case where a party is unable to decide which of two persons to believe, or rather which of two persons a jury would believe, and is therefore in doubt which is liable to him at law. We do not understand that a doubt in the mind of a party as to which of two persons to believe, or a doubt in his mind as to which of two persons a jury will believe, and for that reason doubtful as to which of two persons is liable to him at law, will entitle him to implead them both in a suit in chancery on the ground of avoiding a multiplicity of suits or a circuity of action.

As we understand the rule of pleading in chancery, is required to be as certain as at law. *Prestidge* v. *Pendleton,* 24 Miss. 80. If a person is hailed into the chancery court, to hold him there, a case must be stated against him no less certainly than at law. And in the case at bar to so state a case against appellee Ware, would prevent the statement of a case against defendant Dickson, and *vice versa.* And if he stated a case with certainty against appellee, it is manifest that the jurisdiction of the suit is at law. And on the other hand, if appellant should state a case with certainty against defendant Dickson, then appellee Ware should not have been sued, and the jurisdiction is at law.

But for the case of *George* v. *Solomon,* 71 Miss. 168, 14 So. 531, we would say this is a novel proceeding and without precedent; but as the above-mentioned case is on all fours with the case at bar, and Judge COOPER said therein that it was a novel proceeding without precedent we refrain from doing so.

As stated by appellant in his brief, as quoted by us above: "We say that Dr. Ware is liable to us or that Mr. Dickson is liable to us." And while it is true

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that in one place in his bill of complaint appellant says that appellee is liable to him in the premises, yet it must be borne in mind that the premises are the averments of fact by complainant. And it is just as appellant says in his brief, the bill charges that either Dr. Ware is liable or defendant Dickson is liable.

We submit, that if Dickson is to be sued for fraud, he should be charged with perpetrating a fraud; yet the complainant only charges that he is guilty of fraud if what Ware says is true, but does not charge that what Ware says is true. The bill of complaint charges that even at the time of filing, the defendant Dickerson says that Ware signed the note of the company, then how can Dickson be hailed into any court, much less the chancery court, to answer for a fraud in this matter without being specifically charged that what he contends is untrue. And how can Ware be hailed into the chancery court on this note, instead of a justice court, by charging that he probably has a valid defense, and if he has, another is liable for the debt for fraud. This court has very clearly defined the jurisdiction of the chancery court on the ground of the avoidance of a mutiplicity of suits in the case of *Gulf & Ship Island Railroad Company* v. *Barnes et al.*, 94 Miss. 484, 38 So. 823. In that case the railroad company undertook to enjoin suits at law by Barnes and others for injuries sustained in a railroad collision, and impleaded them all in one suit in the chancery court, to avoid a multiplicity of suits. See High on Injunctions, p. 329; *Murphy* v. *City of Wilmington*, 6 Houst. (Del.), 139, 22 Am. St. Rep. 345. And especially see *Hale* v. *Allison*, 188 U. S. 77, 23 Sup. Ct. 252, 47 L. Ed., 380.

Now, in the case at bar the appellant does not charge that the defendants, Ware and Dickson, are liable to him, jointly or severally. He charges that as against one or the other of them, he does not know or say which, he has no case at all; depending upon which of

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them the court shall believe is telling the truth, a matter which he leaves entirely to the court. We take it that Ware and Dickson, in the opinion of the appellant, are both fully solvent, and a decree against either, as suits the pleasure of the court, will be satisfactory to appellant.

It will be noted that the wholesome doctrine of multifariousness cannot be overrun to avoid a multiplicity of suits; that a "multiplicity of suits" and a "multitude of suits" are not synonymous terms. That only those suits can possibly be combined to avoid a multiplicity of suits, that may be determinable by the application of the same principles of law, and by the establishment of practically the same facts. And if that be true, and that is what this court said in the case just quoted from, then equity has no jurisdiction of appellant's suit on the ground of avoiding a multiplicity of suits; because (1) the principles of law are different as to the claim against the defendants, being the principles of the law of contract and the principles of the law in relation to torts, and (2) the case cannot be determined as against the defendants by the establishment of practically the same facts, for the facts that will release Ware will, with other facts, render Dickson liable, and the facts that will release Dickson, will render Ware liable. In other words, the case, if any, against Dickson is wholly dependent upon there being no case against Ware. The cases, and we use the plural just for argument's sake, for the complainant does not claim to have a case against one or the other of the defendants, are diametrically opposed to each other. As a matter of fact, there is but one case, for, as complainant has said: "We say that Dr. Ware is liable to us or that Mr. Dickson is liable to us." Nowhere does he claim that both are liable to him, either jointly or severally; but avers that as against one of them he has no right of recovery at all.

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It is true that appellant does not plant his right to bring this suit in the chancery court upon the ground of avoiding a multiplicity of suits, but upon the ground of avoiding a circuity of action, so he says in his brief as quoted by us. But we have thought it well to deal also with the ground of preventing multiplicity of suits as well as the ground of preventing circuity of actions; because the distinction between them is sometimes so narrow as that they almost overlap.

In the same volume of Cyc. to-wit, Vol. 16, to which appellant has referred the court, and on page 63 thereof, is found the following: "(11.) Avoiding circuity of action, where, instead of a complexity of controversies between two parties with respect to the same subject-matter, the complexity arises from there being involved the several rights of more than two, each demanding adjustment, and each requiring at law a separate action, equity will frequently take jurisdiction of a suit to which all are parties and therein adjust all rights and determine the whole controversy. The entertainment of bills to enforce directly a demand against the person ultimately chargeable, where at law the remedy would be against one secondarily liable, has in some cases been placed upon the same ground or preventing circuity of action." And see note 68 at the bottom of the above page.

As stated, the bill should present the rights of two persons, each demanding adjustment, but such is not the case. The rights of two parties over the same subject-matter, each demanding adjustment, is not presented by the bill. The bill does not aver that both defendants are liable to complainant, in the first place; and in the second place, there is no allegation of rights to be adjusted between the defendants. The bill only charges that if what the defendant sued in tort says, is true, then the defendant sued in contract is liable in contract, and there is no tort; and if what the defend-

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ant sued in contract says, is true, then the defendant sued in tort is liable in tort and there is no contract.

Aside from the fact that the appellant does not, and cannot state a case against both defendants to save his life, yet if he did, or could, we do not believe that two persons, one liable, if at all, *ex contractu,* and the other liable if at all, *ex delicto* can be sued jointly. As said by Judge WHITFIELD in the case of *Railroad Co.* v. *Barnes,* from which we have quoted, the doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties, is a wholesome doctrine. If appellee says he did not sign the note of the company, what jurisdiction of a suit against appellee on the note does the chancery court thereby acquire, because forsooth, some one says he did sign it, or said he did sign it; even if that some one procured money for the company upon the representation, and may be liable for the amount of the note for fraud? The two cases are entirely distinct, between different parties, and rest upon different facts. The two cases are so opposed to each other, and so fatally opposed to each other in the case at bar, that appellant did not undertake to charge that either defendant was liable to him, but that one or the other was, being careful not to charge what were the facts with reference to the execution of the note by appellee further than to say that appellee contends he did not sign the note of the company, and defendant Dickson says he did. For appellant to have charged facts making appellee liable, would have shown no case against defendant Dickson, and *vice versa,* which would have clearly shown that the suit should be at law against the one or the other, owing to what appellant charged to be true. But appellant, by not charging anything to be true in regard to the execution of the note by appellee, contends that he has presented a case of equity jurisdiction. We

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have shown, however, that certainty in pleading is required as strictly in chancery as at law, and that such a bill as that in the case at bar, is a pure and simple fishing bill.

There is no equity on the face of the bill, which is one of the grounds of the demurrer of appellee and challenges the sufficiency of the bill through and through.

Appellant did not discuss this ground of the demurrer, but preferred to pass it up, and discuss the second ground, that the appellant has an adequate and complete remedy at law. Because appellant is afraid he cannot win his case against appellee, does not render his remedy at law against appellee any the less full, adequate and unembarrassed. If fear of losing a case on the part of a litigant, or his attorney, were a ground of equity jurisdiction, then every case in which there is an issue of fact to be tried, could be brought in the chancery court. But that is not the law; for that would not quiet the fear, as we can testify.

The bill is purely and simply a fishing bill. There is but one defendant liable. Appellant will not take the responsibility to state which defendant is liable, though it is his duty so to do under the laws of pleading. But so to do would be to turn the other defendant loose, and show the fallacy of his contention of equity jurisdiction. The defendants are not both liable, nor is either liable in the capacity in which the other would be. One is liable, if at all, in contract, and the other, if at all, in tort. And neither is stated to be liable under any allegation of facts which the court is asked to believe. It seems to us that appellant has misconceived the whole proceeding.

We respectfully submit that under the authorities we have presented, there is no equity on the face of the bill, and that the appellant has a full, adequate and complete remedy at law, and that the decree of the

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lower court sustaining the demurrer of appellee and dismissing the bill of complaint, should be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellant, F. W. Foote, filed his bill of complaint against the appellee, J. M. Ware, and one Benjamin H. Dickson. The appellee, J. M. Ware, demurred to the bill on the ground that no equity appeared on the face of the bill and that there was an adequate and complete remedy at law. From a decree sustaining the demurrer and dismissing the bill as to appellee, Ware, this appeal is taken by the appellant, Foote.

It appears from the bill that defendant Dickson, who was president of the Cadenhead Drug Company, a defunct concern now out of business, obtained a loan of one hundred and twenty-seven dollars for said concern from the appellant, by tendering and delivering to the appellant what purported to be, and was represented by Mr. Dickson to be, the note of said company, jointly signed by the appellee, Ware. The bill shows that, when the note fell due and was presented to the appellee for payment, the appellee declined to pay same on the ground that it was not his note, stating to the appellant that the note which he executed was the joint note of himself and defendant Dickson, as surety for defendant Dickson individually, and not for said company, and that while the note presented bore his signature, yet after its execution by appellee, and without his authority, the name of said company had been written above the name of said Dickson thereon and the abbreviation "Pres." written after the name of said Dickson thereon, making it to appear to be the note of said company by said Dickson as president, with appellee as surety in the capacity of joint maker with said company.

The bill also charges that appellant loaned the money

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to said company on the credit of appellee, Ware, based upon the representations of defendant Dickson that the appellee's signature to said note guaranteeing the payment by said company was in every way regular and valid. The bill further charges, in substance, that the complainant in making the loan to the company relied upon the representations of defendant Dickson as aforesaid, and that Ware is liable to appellant on the note; but, if Ware is not liable on the note, then Dickson is liable for the amount thereof for his fraudulent representations. The appellant does not undertake to charge that the contrary statements of Ware or Dickson are true or false. The bill charges no fraud or collusion between Ware and Dickson nor does it allege with certainty that Dickson was guilty of fraud.

It seems clear to us that the appellant had an adequate and complete remedy at law, for the reason that, if the claim made by the appellee, Ware, was shown to be untrue, then the appellant could only recover judgment against Ware on the note. We think that appellant had his adequate and complete remedy in a court of law upon the note as signed and delivered to him by Dickson. If Ware, in law, could defeat recovery on a question of fact as to the alleged change or alteration of the note after he signed it, this alone would not afford the appellant a remedy in equity against the appellee, Ware. There is no question of multiplicity of suits or circuity of action involved, as it may be that there is but one suit maintainable, against one or the other, or separate and different actions against each. A judgment against either might end the controversy. If the claim of one is true, the other must be false, and to determine this issue a court of law is the proper forum.

The decree of the lower court is affirmed.

Affirmed.

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HAWIE *v.* STATE.

[83 South. 158, In Banc. No. 20880.]

1. CRIMINAL LAW. *Petition for writ of error coram nobis taken as true on demurrer.*

   A demurrer to a petition for a writ of error *coram nobis* admits all facts well stated or pleaded in the petition.

2. INSANE PERSON. *Common law prevails where insanity is made known at the trial.*

   There is no statute in this state which lays down the procedure in cases where it is made known to the court that the defendant is insane at the time he is placed upon trial for a felony, but in such case the common law on the subject is clear and must prevail.

3 INSANE PERSONS. *Not to be arraigned for crime.*

   If a man in his sound memory commits a capital offense and before arraignment becomes mad he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought.

4. INSANE PERSON. *Not to be tried for crime.*

   If after a prisoner has pleaded he becomes mad, he cannot be tried, for he cannot make his defense.

5. SAME.

   If after one charged with a felony has been tried and found guilty, he loses his senses before judgment, judgment should not be pronounced.

6. SAME.

   If after one charged with a felony has been tried, convicted and sentenced, he becomes insane, execution should be stayed.

7. CRIMINAL LAW. *No appeal by one convicted while unknown to be insane.*

   Where an accused was arraigned, tried and convicted while insane, such insanity being unknown to the court he has no remedy by appeal.

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8. CRIMINAL LAW. *Writ of coram nobis recognized.*
A writ on the nature of the writ of *coram nobis* has always been recognized in this state as a common-law remedy in appropriate cases.

9. CRIMINAL LAW. *Writ of coram nobis.*
A writ in the nature of a writ of *coram nobis* is applicable to criminal as well as civil proceedings. It is founded upon the inherent power of the court over its judgments and proceedings

10. CRIMINAL LAW. *Writ of coram nobis applies to reverse conviction of one insane at trial.*
A circuit court judge has power, after the expiration of a term, to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case, where it appears that the defendant was insane at the time of the trial, and the fact was not made known at the trial, and upon the assignment of such error in fact, if disputed by the state, to cause a jury to be impaneled in term to try such issue; and the venue for the trial of such issue may be changed to another court but the change carries the whole case.

APPEAL from the circuit court of Rankin county.

HON. A. J. MCLAURIN, Judge.

George Hawie was convicted of murder and sentenced to death. From an order sustaining a demurrer to a petition for a writ of error *coram nobis,* he appeals.

The facts are fully stated in the opinion of the court.

L. M. Burch, for appellant.

Appellant was tried, convicted and sentenced to be hanged, at the January, 1919, of the circuit court of Rankin county, Mississippi. He was tried on the 24th day of January, of the said term, and on the 25th day of January, the said court finally adjourned.

Between the time of appellant's conviction and the final ajournment of said court, he was confined within the county jail of Rankin county, without an opportunity to communicate with any one who was interested in him, or who knew of his mental infirmities.

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Relatives of the appellant knew nothing of the said trial, until after the adjournment of the court.

On the ——day of June, 1919, in vacation, the appellant filed his application with the trial judge for a writ of error *coram nobis* to issue, because of certain errors of fact, committed at the trial of his case, which said errors of fact, the trial court had no knowledge of at the time of trial. In his said application, the appellant, through his attorney, alleges that at the time of and during the said trial, he was an insane man, to the extent that he was wholly incapable of pleading to the indictment against him, or, of offering any sort of defense, or of making a defense to the said charge; further, that he was, so insane, at the time of the commission of the crime charged, and is still insane.

The said petition also alleges that appellant was deprived of his right of a fair and impartial trial as contemplated by law, because of a violent prejudice, which existed in the minds of the people of the county in which he was tried; that by reason of threats of mob violence, directed against the appellant, the attorneys representing him, were deterred and restrained in their efforts to properly present appellant's case to the court and jury; that by reason of the said prejudice, appellant was prevented from presenting a motion to the court for a change of venue to have his case removed from the said county, because the said mob (then and there gathered around the place of his trial), prevented appellant from doing so by threatening to do violence to any one who might make the necessary affidavit, required by law, to accompany the motion for such change; notwithstanding his case had been universally prejudged in the said county, appellant was, for this reason, forced to go to trial in a court where his conviction was a foregone conclusion

Appellant further alleges that the said violent prejudice extended, not only to himself, but to the immediate

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members of his family, said family being warned to stay away from the Rankin county court while appellant was being tried, lest the said mob do them violence also, and for this reason none of his said family attended the trial.

And for other causes set forth in his said petition. which said petition is a part of the record before this court on appeal, and to be considered as a whole in passing on the merits of said petition.

Appellant would show that his application for the said writ was set down for hearing at the July, 1919, term, of the said Rankin county court; that when same came on to be heard, the district attorney acting in behalf of the state interposed a demurrer to said petition which is in part as follows: "Said petition affirmatively shows that each and every ground cited therein for a writ *coram nobis* existed at the time of the trial and conviction of the said defendant."

The said demurrer was by the court sustained and the appellant denied a hearing on the merits of his petition or the relief prayed for therein, to which said action on the part of the court, the appellant duly accepted and prosecutes this appeal.

By the interposition of the said demurrer to appellant's petition for the said writ, the state admits each and every allegation contained therein, true as stated, and thereby confess that appellant was in truth and in fact a lunatic at, and during the period of his trial, and wholly incapable of offering any defense he might have had to the crime charged against him; that he was further incapable of informing his attorneys (who were appointed by the trial court just a few minutes prior to entering upon the trial), of any defense that he might have, because of his said insanity. The question as to whether the appellant was in truth and in fact, so insane, at the time of his trial is, therefore,

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not in question here, same having been disposed of by the said demurrer.

The district attorney at the hearing of the said demurrer, relied solely on the case of *Fugate* v. *State,* 85 Miss. 94, as an authority to sustain his position. In the Fugate case this court held that, the writ could not be so comprehensively used as heretofore under the common law, because of various statutory enactments in this state, and said:

"Within this rule must fall the defense of insanity, as well as all other defenses existing at the time of the commission of the crime, within this rule must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters."

Clearly, under this rule, had the appellant based his petition for the said writ on his lack of sanity at the time of the commission of the crime, the sustaining of the demurrer could not have been here complained of. But such is not the case. His petition raises the question of his sanity and his capacity to defend himself in a court of justice, at the time of his arraignment, plea, trial and the rendition of judgment against him.

The rule above quoted from the Fugate case is but an extract or quotation from the case of *Sanders* v. *State,* 85 Ind. 318, 44 Am. Rep. 29. The facts in the Sanders case, are on all fours with the facts of the case at bar. Judge ELLIOTT, in the Indiana case, after having used the exact language quoted above from *Fugate* v. *State, supra,* said, when he undertook to differentiate between the question of the insanity of a defendant at the time of the commission of the crime, and his insanity at the time of the trial and judgment, as grounds for the issuance of the writ *coram nobis*:

"We do not deem it necessary, to discuss the question of the appellant's insanity at the time the plea of

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guilty was entered there are cases holding that such cause was sufficient ground for a writ *coram nobis* or a proceeding of like character. *Adler* v. *State,* 35 Ark. 517; *State* v. *Patton,* 10 La. 229; Warton, Cr. Law, 52; 1st Bish. Cr. Law, sec. 396; *McLean* v. *Davis,* 77 Ind. 419. All we deem it necessary to say upon this point is, that if the court below has determined this question before receiving the plea, an appellate court should be slow to interfere, if it should indeed interfere at all, and should only do so upon clear and convincing evidence. The question of the appellant's capacity is however a circumstance of importance to be taken into consideration, in connection with his conduct when the plea was entered, as this was under circumstances threatening great and immediate peril. *Ewell Lead Cos.,* 771."

A perusal of the Sanders case will show that the trial court, in all probability, knew of Sanders' metal condition, because, as stated by Judge ELLIOTT, the appellate court was reluctant to take this phase of the case from the consideration of the trial court. The appellant in the case at bar, presents an entirely different proposition. It is specificially alleged in his petition for said writ, that appellant's insanity was unknown, either to the court; or to the attorneys who represented him at the trial. In the opinion of Judge ELLIOTT in the Sanders case, he cites with approval a case from his own court, where the writ issued because of a defendant's insanity at the time of judgment. *McLean* v. *Davis, supra.*

After Judge WHITFIELD had adopted the rule of the Sanders case, in his opinion in the *Fugate* v. *State, supra,* as to the defense of insanity at the time of the commission of the crime, when he came to discuss the incapacity of a defendant at the time of trial, said; "as a striking and conclusive illustration of the necessity that the writ, or some substitute therefor should

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exist in criminal practice, we refer to *Calhoun* v. *State* (Kan.), 18 L. R. A. 838; *Sanders* v. *State*, 85 Ind. 318, and especially to the case of *Ex Parte Gray*, 77 Mo. 160. The statute of Missouri provides that where any person under eighteen years of age was convicted of a felony he should be sentenced to inprisonment in the county jail and not the penitentiary. Gray, though under eighteen years of age, when the felony was committed, had been sentenced to the penitentiary at a term of the circuit court, and after the adjournment of the court, he filed his application for this writ to have the judgment set aside; it appearing by satisfactory evidence that the fact was as stated, the judgment was revoked in order that the defendant might be sentenced according to law, this is but one instance illustrative of the necessity of the writ in criminal practice, and a thousand might be conceived."

As an aditional authority, that the question of the defendant's insanity at the time, of the judgment can be relied on as ground for the writ, after the adjournment of the trial court, we quote from the case of *Sanders* v. *Mitchell*, 61 Miss. 321, wherein Judge COOPER said in part:

"If the bankrupt was a lunatic at the date of adjudication of bankruptcy, the bankrupt court proceeded in error of fact, and the mistake should have been pointed out by writ of error *coram nobis*."

In R. C. L., 2, page 308, "also when the accused is insane at the time of conviction, cases holding that he may secure relief by the writ are to be found." The text writer of this great legal work, cites as the chief authority for the rule the case of *Sanders* v. *State*, Ind., *supra*.

"R. C. L., 2, page 208, "as regards the effects of lunacy of the defendant at the time judgment was rendered against him, which fact was not presented to the court, the authorities are in conflict, although both

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text writers and courts have asserted that it is ground for relief by a writ of error, *coram nobis,* (citing) *Allison* v. *Tayler,* 6 Dana (Ky) 87; 32 Am. 68; *Leach* v. *Marsh,* 47 Me. 548; 74 Am. Dec. 503."

This court clearly adopted the rule that incapacity of a defendant at the time of the trial and judgment is ground for the writ, in both the cases of *Fugate* v. *State, supra,* and *Sanders* v. *Mitchell, supra.* This is the law in every state in the union except where the writ has been disposed of by statutory enactment.

It cannot be successfully argued that because the appellant could have availed himself of some statutory remedy prior to the adjournment of the trial court, that his failure to do so bars him further judicial relief under the laws of this state, when he was a lunatic and incapable of knowing of any relief, statutory or otherwise. This court approved the Sanders case of Indiana in its opinion in *Fugate* v. *State, supra,* as well as many other cases where the writ was declared applicable in states that afforded the same statutory remedies as are in use in this state, where through no fault of the defendant the statutory relief was not availed of. This court declared the case of *Sanders* v. *State, supra,* to be, by far, the most luminous and lucid case on the subject to be found at all. In that case it was held that the common law should, in such cases be used in aid of, and in futherance of, the statutory law, where a defendant could not and did not avail himself of statutory remedies.

The blood-thristy American Aborigine would sever the cords and release his victim from the stake when the subject manifested signs of mental incapacity. No Government, historic or prehistoric, has failed to provide in its laws a sufficient protection for those, whom an Eternal God had visted with this affliction. It cannot therefore, be said, that in this present day of enlightenment and advanced civilization, when the laws that

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govern mankind have been adjusted to a marked state of perfection, and afford more protection now to life, liberty and property than ever before, that, because some technical rule of law has not been complied with by a defendant who is mentally incapable of knowing any rule, or any law of man or God, has for such a breach forfeited his life. Such is not the law in this state, nor, has it ever been the law, or will it ever be the law. An incompetent litigant has never been called upon in the courts of this state to put his life or his property at hazard, save when his committee stood in his stead, armed with all the law and facts, pertinent to the lunatic's case. This is the only way justice can be meted to the insane, for what Judge, or what court, can administer even-handed justice to litigants when one side of the case is locked in the brain of a madman.

The English common law has been solemnly adopted in the state of Mississippi, and is being daily used in every court of the great commonwealth, as a means of aiding, and supplying the defects of our statutory laws, in dealing with life, liberty and property, hence, the writ of error *coram nobis,* or *vobis,* is just as much a part of the rules of procedure, in this state (in a proper case) as any known statutory procedure. The appellant should not be denied relief thereunder, when it is so clearly shown that his failure to avail himself of statutory remedies was no fault of his, but to be attributed to his mental infirmities. *Halford* v. *Alexander,* 12 Ala. 280, 46 Am. Dec. 253; 2 R. C. L., pages 305, 306, 308; *Allison* v. *Taylor,* 6 Dana (Ky.) 87, 32 Am. Dec. *Sanders* v. *Mitchell,* 61 Miss. 321; *State* v. *Calhoun* (Kan.), 18 L. R. A. 838; *Sanders* v. *State,* 85 Ind. 318, 44 Am. Rep. 29; *Leach* v. *March,* 47 Me. 548, 74 Am. Dec. 503.

The facts set forth in appellant's petition for the writ *coram nobis,* and admitted by the state by the

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interposing of its demurrer, shows that at the time of appellant's trial he was prevented from securing a change of venue from Rankin county, where his case had been generally prejudged, through fraud practiced upon him by a mob of lawless men. That his attorneys were determined in their efforts to defend him, through threats and menace of the same mob; his immediate family kept away from the trial of appellant because of the threats made against them, by this mob, and from going to the court during the progress of the trial and informing it of the mental condition of the appellant.

In *Fugate* v. *State, supra,* this court said that the cases of *Calhoun* v. *State, supra,* and *Sanders* v. *State, supra,* were striking and conclusive illustrations of the necessity of the writ, in criminal practice, or some such procedure, and that a thousand might be conceived. In both the Calhoun and the Sanders cases the writ issued because of the threats of mob violence and because the defendants and their attorneys were prevented from making a proper defense for defendants.

The allegations in appellant's petition for the writ reveals a condition surrounding his so-called trial identical with the conditions surroundings the defendants in the Calhoun and Sanders cases, at the time of the trial, yet, the appellant was denied, not only the relief prayed for in his petition, but was not even given a hearing on the merits thereof.

Appellant most respectfully urges the court to pass directly upon the proposition, as to the application of the writ of error *coram nobis,* on the ground of the defendant's lunancy, at the time of trial and judgment, in contradistinction to the proposition of the insanity of a defendant at the time of the commission of the crime. In doing so the court will give the Bench and Bar of this state the correct application of the principles set forth in the *Fugate Case, supra.*

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Appellant prays that the court reverse and remand this cause to the circuit court of Rankin county, with instruction that his petition be heard on its merits and that the writ of *coram nobis* issue.

R. M. Bourdeaux, assistant attorney-general, for the state.

The writ or error *coram nobis* has been in such a state of "innocuous desuetude" that its proper use and scope is involved in obscurity and doubt. Realizing this. Chief Justice WHITFIELD, in the case of *Fugate* v. *State,* 85 Miss. 94, rendered an illumining opinion after an exhaustive investigation. This decision of Chief Justice WHITFIELD is not only the leading authority in Mississippi, but it has been widely quoted and generally cited throughout the country.

In the *Fugate Case,* Judge WHITFIELD decides, as *dictum,* that the defense of insanity cannot be made the ground of an application for a writ of error *coram nobis.* Counsel for appellant recognizes the adverse holding in this case and confesses that if he had merely raised the question of insanity at the time of the commission of the crime, he would have nothing to complain of as error, but counsel seeks to make a distinction in this case between insanity at the time of the commission of the crime and insanity at the time of the trial.

Before further considering the decisions of other jurisdictions, it is well to first have clearly in mind the facts surrounding the trial of this appellant for the purpose of correctly differentiating between the case at bar and the reported decisions. George Howie the appellant here, did not plead guilty. George Howie, the appellant here, had two lawyers to represent him at his trial.

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In the same case at bar, the defendant was represented by counsel, and under the advice of his counsel he took the stand in his own behalf and after the regular and orderly introduction of testimony on the part of the state and on the part of the defendant, the jury brought in a verdict of guilty.

The only Mississippi statutes that we have found touching the subject of insane persons charged with crime are as follows:

Section 1285 of Hemingway's Code: "Execution in capital cases—what to be done if convict be insane or pregnant. If the sheriff shall at any time be satisfied that any convict in his custody under sentence of death is insane, or that any female convict under like sentence is pregnant, he shall, with the concurrence of the judge of the circuit court, or of the chancellor or the president of the board of supervisors in the absence of the circuit judge, summon six physicians, if to be had, and if not, other discreet and experienced freeholders and electors of said county, to make up an inquest to inquire into such insanity or pregnancy, as the case may be. The sheriff shall summon and swear all necessary witnesses, and the jury and sheriff, after full examination, shall certify, under their hands, what the truth may be in relation to the alleged insanity or pregnancy. And in case such convict shall be found insane or pregnant, the sheriff shall immediately transmit the verdict of the jury to the governor, and suspend the execution of the sentence until the governor shall be satisfied of the sanity of the convict, or that the convict is not or is no longer pregnant, when he shall order, by his warrant to the sheriff, the execution of the convict, on a day to be therein appointed by the governor, according to the sentence and judgment of the court."

Section 1300 of Hemingway's Code: "Conservators of peace. Charged with the commission of an offense, and, in the course of the investigation, it shall appear

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that the prisoner was insane when the offense was committed, and still is insane he shall not be discharged, but the conservators of the peace shall remand the prisoner to custody, and forthwith report the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with the case according to the law relating to persons of unsound mind."

Section 1301 of Hemingway's Code: "When grand jury do not indict because of insanity, what shall be done. When any person is held in prison or on bail charged with an offense, and the grand jury shall not find a true bill by reason of the insanity of the accused, the grand jury shall certify the fact to the circuit court, and state whether such insane person be in such condition as to endanger the security of persons or property and the peace and safety of the community. And if the grand jury report such unsoundness of mind and such danger, the court shall forthwith give notice of the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with such person and his estate according to the law relating to persons of unsound mind."

Section 1302, of Hemingway's Code: "When acquitted because of insanity. "When any person shall be indicted for an offense, and acquitted on the ground of insanity, the jury rendering the verdict shall state therein such ground, and whether the accused has since been restored to his reason, and whether he be dangerous to the community; and if the jury certify that such person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state asylums for the insane."

Coming now to the consideration of the decisions of other jurisdictions the statement of Chief Justice MARSHALL that no decision is a positive authority in any case except co-extensive with the facts of the case in which the decision was rendered is pertinent

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and with this in mind, we shall now proceed to set out some of the leading cases on the use of the writ of error *coram nobis*.

Sanders v. *State*, 85 Ind. 318, 44 Am. Rep. 29, is one of the leading cases and is relied on by counsel for appellant in the case at bar. Counsel for appellant evidently misconceived the grounds of granting the writ of error *coram nobis* in the Sanders case. The decision in that case, in our opinions, was predicated solely and exclusively upon the ground of duress which was tantamount to fraud. The defendant in that case had by intimidation been coerced into withdrawing a plea of not guilty and entering a plea of guilty. The court held that the circumstances under which the plea of guilty was entered were such as to render the plea an absolute nullity, and it was undoubtedly the Sanders case that Judge WHITFIELD followed when he announced that insanity was not a ground for the writ of error *coram nobis*.

In the case of *State of Kansas* v. *Robert Calhoun*, 18 L. R. A. 838, is another leading case, and like the *Sanders case, supra*, the granting of the writ of error *coram nobis* was solely on the ground that the plea of guilty had been entered under duress.

The case of *Adler* v. *The State*, 35 Ark. 518, is the only case that we have been able to find that sustains the contention of counsel for appellant and in this case the supreme court of Arkansas held that a circuit judge has power after the expiration of a term to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case where it appears that the defendant was insane at the time of the trial and the fact was not make known at the trial.

We find numerous decisions in which there are, of course, great contrariety of opinion involving the proper use of the writ of error *coram nobis* in civil

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cases, but we do not think that any of these decisions throw light on the case at bar.

It is generally stated that there are two lines of decisions, one holding that insanity is a ground for the issuance of the writ of error *coram nobis* and the other line of decisions the Sanders case and the Fugate case, for instance, holding that the defense of insanity is not a proper ground.

Now we submit that if this court follows the *dicta* of the Fugate case and the Adler case, the learned circuit judge was correct in sustaining a demurrer to the petition for a writ of error *coram nobis*. In order to escape the conclusion announced by Judge WHITFIELD in the Fugate case in respect to insanity, counsel for appellant argues that he not only alleges insanity at the time of the commission of the crime, but that he also alleges insanity at the time of the trial, and sentence and also alleges duress induced by threats of mob violence.

If it be held that insanity at the time of the commission of a crime is not a proper ground for the issuance of the writ of error *coram nobis,* we take it that it makes absolutely no difference why the defense of insanity was not interposed at the trial, whether from neglect or indifference, or lack of knowledge on the part of counsel, or from duress induced by threats of mob violence, or from the fact of insanity itself at the time of the trial. The law as announced in the Fugate case is this, where insanity is not interposed as defense in a criminal prosecution, a writ of error *coram nobis* will not lie in order to annul the judgment of conviction and order a new trial under the indictment that the defense of insanity might be interposed in such new trial.

In cases other than the one at bar, there might be some merit in drawing a distinction between insanity at the time of the commission of the crime and in-

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sanity at the time of trial and conviction; in cases other than the one at bar there might be some merit in allegations of duress induced by threats of mob violence, but in the case at bar it can make no difference whatever because, taking the allegations of appellant's petition as being true, all that he has been deprived of is the benefit of his plea of insanity, at the time of the commission of the crime as a defense to the charge.

If appellant's attorneys in the trial court had not been intimidated and if they had asked for and procured a change of venue to another county the only defense under the record in this case that appellant could have interposed in the trial in such other county was his insanity at the time of the commission of the crime.

In other words if this case is reversed, the effect of it would be merely to let the appellant plead insanity at the time of the commission of the crime as a defense to the prosecution, which Judge WHITFIELD says in his *dictum* in the Fugate case cannot be done.

This is not a case where a plea of guilty has been extorted from the appellant.

This is not a case where, because of duress induced by threats of mob violence or because of insanity at the time of the trial, appellant was deprived of the right of interposing defense other than insanity to this prosecution, such as self defense, justification, proving an alibi, etc., etc.

We repeat that if insanity at the time of the commission of the crime is not proper ground for the suing out of a writ of error *coram nobis,* that it can make no difference why the defense was not interposed at the first trial and that in the last analysis this is merely a proceeding to permit the appellant to interpose the defense of insanity and that if the writ of error *coram nobis* is ordered issued and the former

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judgment of conviction annulled, the only possible defense that the appellant can interpose at the second trial will be his insanity at the time of the commission of the offense.

Adler v. *The State,* 35 Ark. 517, is, in our opinion, authority for the reversal of this case, but if this court follows the *dicta* of the Fugate case and the Sanders case, we submit that the judgment of the circuit court sustaining the state's demurrer to this petition should be affirmed.

We do not think that the attorneys for this appellant, in the court below, are subject to any adverse criticism. We think that the statement of the accused himself convicts him of murder and it certainly was not within their province to suggest a defense.

The possibilities in this case present a rather interesting query; If the former judgment of conviction should be annulled, could the appellant in a subsequent trial claim that he was sane and plead former jeopardy in bar of the second prosecution.

STEVENS, J., delivered the opinion of the court.

Appellant was indicted by the circuit court of Rankin county for the murder of Annie Bell Seaney, and at the January, 1919, term was tried, convicted, and sentenced to death. After the adjournment of the court, and in June, 1919, appellant filed an application with the trial judge for a writ of error *coram nobis,* based on certain alleged errors of fact in the trial of said cause. The petition is lengthy, and contains many averments, which, for the purposes of this opinion, need not here be set forth. The main errors of fact relied upon are the averments that appellant was insane at the time he was placed upon trial and convicted, and still is insane, and because of his mental incapacity was unable to advise with counsel or make his defense;

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that appellant was financially unable to employ counsel, and on that account the court appointed two attorneys to represent him, but that these attorneys were not appointed until the day of the trial, and had no knowledge of appellant's insanity, and no means of knowing that petitioner was unable to conduct his own defense; that the attorneys appointed by the court had only a short conference with petitioner before the petitioner was placed upon trial, and because of petitioner's insanity he was incapable of informing said attorneys of his defense of insanity or of suggesting or advising with the said attorneys on any material matter pertaining to his defense; that the relatives or family of petitioner were not present at the trial, and knew nothing of the action of the court in appointing attorneys to represent defendant, and did not know who the said attorneys were until after the said trial and conviction, and for that reason were unable to communicate with or advise said attorneys or the court of said insanity. It is further averred that petitioner was insane at the time of the homicide. It is alleged that the attorneys who now represent petitioner are in possession of facts and circumstances which they have learned since the trial, and of which the court had no knowledge at the time of petitioner's trial, and are now prepared to show that at the time of the trial petitioner was insane, and to furnish the court with the facts pertaining to this insanity, facts which, if known, would have prevented petitioner's trial and the judgment that has been pronounced against him.

The petition had lengthy averments to the effect that public sentiment and feeling was so aroused against petitioner and such prejudice existed against petitioner that he was denied that fair and impartial trial contemplated by the Constitution. It is further averred that petitioner was placed upon trial and convicted on the 24th day of January, 1919, and that the court

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finally adjourned on the 25th day of January, 1919, in ignorance of the facts set forth in said petition. The prayer of the petition is that the petition should be heard at the next regular term of the court, and upon hearing the judgment of conviction heretofore entered be revoked and annulled and a new trial awarded, or such further disposition made of petitioner as may conform to law. The petition has attached thereto the affidavit of L. M. Burch, as attorney for petitioner, that the facts set forth in the petition are true and correct to his best information, knowledge, and belief. To the petition as presented the following demurrer was interposed:

"Comes the state by W. C. Eastland, district attorney, and demurs to the defendant's petition for a writ of error *coram nobis*, for the following reasons, to wit:

"(1) Said petition affirmatively shows that each and every ground cited therein for the writ of error *coram nobis* existed at the time of the trial and conviction of the said defendant.

"(2) Other grounds to be shown on the hearing.

W. C. EASTLAND, District Attorney."

This demurrer was by the court sustained, and from this action of the court appellant appeals.

By elementary rules of pleading the demurrer in this case admits all facts well stated or pleaded in the petition. In Ency. of Pleading & Practice, vol. 5, p. 36, in the chapter on *Coram Nobis*, it is stated:

"The fact alleged as error may be admitted by demurrer or plea of *nullo est erratum*, which amounts to the same thing, or by motion to dismiss. . . . No plea is necessary unless some error in matter of fact has been alleged upon which the defendant can make up an issue of fact if he is disposed so to do. . . . Upon the issue of alleged error a trial is had."

The petition in this case clearly avers that George Howie was insane at the time he was placed upon

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trial, and at the time he was actually tried and convicted. This the demurrer admits. Our consideration of the defendant's rights is, therefore, based upon the assumed fact that he was insane at the time he was tried, and his life forfeited by the final judgment of the Rankin county circuit court. The sole question presented is one of law. Does the petition state a case for relief?

There can be little controversy about the *status* of an insane person charged with crime. By section 1538, Code of 1906 (section 1300, Hemingway's Code), it is made the duty of a conservator of the peace to hold a prisoner who appears to have been insane when he committed the offense, and is still insane at the time of the hearing, and to report the case to the chancellor or clerk of the chancery court for the proper inquiry. By section 1539, Code of 1906 (section 1301, Hemingway's Code), it is made the duty of the grand jury who fails to return an indictment because of insanity to certify the fact to the circuit court, and thereupon the circuit court shall give like notice to the chancellor or clerk of the chancery court. By section 1540, Code of 1906 (section 1302, Hemingway's Code), provision is made for those cases in which the accused is acquitted on the ground of insanity. But we have no statute which lays down the procedure in case where it is made known to the court that the defendant is insane at the time he is placed upon trial for a felony. But the common law on the subject is clear and must prevail. Blackstone observes:

"If a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If after he be tried and found guilty,

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he loses his senses before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry VIII, a statute was made which enacted that if a person, being *compos mentis,* should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the Statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edward Coke, 'The execution of an offender is, for example, *ut pœna ad paucos, metus ad omnes perveniat;* but so it is not when a madman is executed, but should fibe a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.' But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury." Wendell's Blackstone's Commentaries, vol. 4, pp. 24, and 25.

A leading case is *Freeman* v. *People,* 4 Denio (N. Y.), 9, 47 Am. Dec. 216, in which the Supreme Court of New York quoted with approval the observations of Sir WILLIAM BLACKSTONE and Sir EDWARD COKE, and observed further:

"The true reason why an insane person should not be tried is that he is disabled by an act of God to make a just defense if he have one. As is said in 4 Harg. Stat. Tr. 205, 'There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defense.' The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person, in a state of insanity, should ever be put upon his trial for an alleged crime,

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or be made to suffer the judgment of the law. A madman cannot make a rational defense, and as to punishment, *furiosus solo furore punitur.* 1 Hale's P. C. 34, 35; 4 Bl. Com. 395, 396; 1 Chit. Cr. L. Ed. 1841, p. 761; 1 Russ on Crimes, Ed. 1845, p. 14; Shelf. on Lunacy, 467, 468; Stock on Non. Comp. 35, 36."

And, after discussing what disposition the court should make of the defendant whose sanity is brought into question at the time of trial, further stated in the opinion:

"The course at common law was much the same. In *Frith's Case,* 22 How. St. Tr. 307, 318, which preceded the act of 39 and 40 George III, to which reference has been made, the prisoner was arraigned for high treason, and a jury sworn to inquire whether he was of sound mind and understanding or not. Lord Kenyon, Chief Justice of the Court of King's Bench, presided at the trial, assisted by one of the judges of the court of common pleas and one of the barons of the court of exchequer. It was observed by the court to the jury that the inquiry was not whether the prisoner was insane when the alleged crime was committed, nor was it necessary to inquire at all what effect his present state of mind might have [been] when that question came to be discussed; but the humanity of the law of England had prescribed that no man should be called upon to make his defense, at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he should be able so to model his defense, if he had one, as to ward off the punishment of the law; and it was for the jury to determine whether the prisoner was then in that state of mind. Shelf. 468."

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In *Jones* v. *State,* 13 Ala. 153, the court by CHILTON, J., observed:

"The evidence strongly indicated, perhaps was conclusive, of the prisoner's insanity at the time of the trial. Under such circumstances, it was not proper that he should have been put upon his trial. By the humanity of the common law, a party who was insane at the time of the trial could not be arraigned. If he became insane after his conviction, he could not be executed while he remained thus demented. See 1 Hawk. P. C. 3, section 3; 1 Hale, 34, 35; 1 Russ. 13; 4 Bl. Com. 25."

To the same effect is *Baughn* v. *State,* 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577, and other cases referred to in the attached case note.

Mr. Bishop says: "If an indicted person is not sane, the court cannot go on with the case; or if he becomes insane after the trial commences, he can neither be sentenced, or, if sentenced, puished, while his insanity continues." Bishop's New Criminal Law, vol. 1, par. 396.

From these authorities it unquestionably follows that if the defendant in this case was insane, the court was in error in placing him upon trial and in pronouncing the judgment of conviction. The fact of the prisoner's insanity was not known either by court or counsel. There was an error of fact which led to an unlawful trial. It must be remembered that we are not here dealing with any alleged errors in reference to the indictment, arraignment, or the actual conduct of the trial itself. The rulings of the trial court on the merits of the case are not presented. We are confronted with an error of fact which was unknown to the court and one which, if the court had known, would have prevented any trial whatever. What then is the prisoner's remedy? The error is one that could not have been availed of during the term of court at which the

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defendant was convicted. There is, therefore, no remedy by appeal. Does the fact that the term of court has elapsed or adjourned preclude any further inquiry or deny any relief? No statute of our state affords relief in the case made by the petitioner. The remedy, if there be one, must be found in the common law. The petition prays for a writ *coram nobis*. The office and functions of a writ in the nature of the writ *coram nobis* have been clearly and well stated in previous decisions of our court. It is not, therefore, the purpose of this opinion to trace the history or justify the use of such writ in our commonwealth. It is sufficient to say that a writ in the nature of the writ *coram nobis* has always been recognized in our state as a common-law remedy in appropriate cases. *Keller* v. *Scott*, 2 Smedes & M. 81; *Fellows* v. *Griffin*, 9 Smedes & M. 362; *Land* v. *Williams*, 12 Smedes & M. 362, 51 Am. Dec. 117; *James* v. *Williams*, 44 Miss. 47; *Fugate* v. *State*, 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 326; *Corby* v *Buddendorff*, 98 Miss. 98, 54 So. 84; *Miss. & Tenn. Railway Co.* v. *Wynne*, 42 Miss. 315. Under these authorities it is clear that the writ is an available common-law remedy in both civil and criminal cases. It only remains to inquire whether the remedy is available to appellant in the case at bar. On the admitted facts there can be no doubt on this point. Indeed insanity at the time of trial or judgment presents a case which the writers have used as illustrating a proper case for the writ *coram nobis*. Mr. FREEMAN says:

"If, however, the proceedings are based upon facts presumed by the court to exist, as when one of the parties is insane, or is an infant, or a *feme covert*, or has died before verdict, and the court supposing such party to be alive and competent to appear as a litigant, renders judgment, it may be set aside by a writ of

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coram nobis." Freeman on Judgments (2 Ed.), par. 94.

The functions of the writ were ably discussed by Chief Justice WHITFIELD in *Fugate* v. *State, supra,* and certain limitations upon the use of the writ in our state indicated, but the court was explicit in stating: "It is perfectly clear, we think, on the authorities, that the writ is applicable to criminal as well as civil proceedings."

Its application to criminal cases is likewise ably discussed in *Sanders* v. *State,* 85 Ind. 318, 44 Am. Rep. 29. Justification for the writ is properly founded upon the inherent power of the court over its judgments and proceedings. The opinion of the Indiana court on page 328 of 85 Ind. (44 Am. Rep. 29), contains the following observations that are apposite:

"That courts possess inherent powers not derived from any statute is undeniably true. Among these powers are the right to correct their records so as to make them speak the truth, to pass upon the constitutionality of statutes, to prevent the abuse of their authority or process, and to enforce obedience to their mandates. If it were granted that courts possess only such rights and powers as are conferred by statute, they would be mere creatures of the legislature, and not independent departments of the government. They are not mere creatures of the legislature, but are coordinate branches of the government, and in their sphere not subject to legislative control. *Deutschman* v. *Town of Charlestown,* 40 Ind. 449; Cooley, Const. Lim. 114, 116; 2 Story, Const. 377."

In Cyc. vol. 23, p. 885, is is said: "But the writ may issue where there is a vital jurisdictional defect not apparent on the face of the record, or on account of the death of a party before judgment, or the infancy, insanity, or coverture of defendant, such disability not having been brought to the notice of the court before

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judgment, or where a default has been irregularly entered against a party not legally in default, or has been taken against him by fraud, accident, or mistake, without fault on his part."

The case of *Adler* v. *State*, 35 Ark. 517, 37 Am. Rep. 48, is directly in point, especially upon the proposition of the insanity of the accused at the time of the trial, paragraph 1 of the headnotes reading:

"A circuit court judge has power, after the expiration of a term, to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case, where it appears that the defendant was insane at the time of the trial, and the fact was not made known at the trial; and upon the assignment of such error in fact, if disputed by the state, to cause a jury to be impaneled in term to try such issue; and the venue for the trial of such issue may be changed to another county, but the change carries the whole case."

We refer also to *Ex parte Gray*, 77 Mo. 160; *State* v. *Patton*, 10 La. Ann. 299, 63 Am. Dec. 594; *State* v. *Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141; 2 R. C. L. 308, and authorities cited in footnotes.

It will be observed in the present case that appellant's mental condition was in no way brought into question during the progress of his trial, and especially was there no plea of insanity interposed.

There is a decided difference between insanity at the time of the commission of the crime and insanity at the time of trial. From the admitted facts and the authorities referred to, the trial court was in error in sustaining the demurrer to appellant's petition. In the language of Sir Edward Coke, the execution of a madman would be a "miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others."

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The judgment of the learned circuit court will be reversed, the demurrer to the petition in this case overruled, and the cause remanded for further and appropriate proceedings.

Reversed and remanded.

ETHRIDGE, J. (dissenting).

I am unable to concur in the opinion of the majority. In the first place, section 32, Code of 1906 (section 7, Hemingway's Code), expressly abolishes writs of error, and as a writ of error *coram nobis* is a writ of error, being a particular writ embraced in the general class of writs, it was intended to be abolished by the legislature, and therefore all cases antedating this change in our law have no bearing on the present suit. In the recent cases, embracing all cases arising since this change in the statute, no reference to the statute was made, either in the briefs of counsel or in the opinion of the court, and it is manifest that the court did not intend to limit this statute to a particular class of writs of error. None of the reported cases arising since said change in the statute has allowed the writ. It has been universally refused, and, while the court in the *Fugate Case,* 85 Miss. 86, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 326, stated that the writ existed, it is clear the statute was not called to the court's attention, and at most the opinion is *obiter dictum* on this point. However, I think, independent of whether the writ still exists or not, that no sufficient showing was made in the present case for the issuance of such writ. The petition is filed in the name of George Howie by his attorney, and begins, "Your petitioner would show," etc., setting out that he was insane and incapable of in any way advising his attorneys who represented him at the trial, who were appointed by the court to defend him; that he was insane, or that the plea of insanity was the defense, and

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that because of his insanity that petitioner was not in such position to offer such plea for himself; that the attorneys (naming two attorneys) were appointed to defend him, and had no knowledge of his insanity, and therefore were unable to present a plea of insanity, and that they knew nothing of the facts, and that they took him into a side room, and after a short conference, without conferring with any one save the petitioner, entered upon trial of petitioner. It also undertakes to allege certain facts showing intimidation and coercion to prevent motion for a change of venue. The affidavit to this petition is not made by the attorneys who represented the petitioner at the trial, but by other counsel appearing for the first time since the trial, and this affidavit is not made on the personal knowledge of the attorney, but is made by the attorneys for the client on information and belief. The affidavit in full being as follows:

"This day came and personally appeared before me the undersigned officer of the law, in and for the said state and county, L. M. Burch, attorney of record for the petitioner, George Howie, and says that he appears in the stead of the petitioner because the petitioner is insane and incapable of making this affidavit to his petition for a writ of error *coram nobis,* who, after being first duly sworn by me, states upon oath that the facts set forth in the said petition and the affirmative allegations therein are true and correct as to his best information, knowledge, and belief."

There is no supporting affidavit by the attorneys who defended him, nor by the officers having the petitioner in custody, nor is there any expert testimony, nor indeed any testimony of any kind other than this affidavit, and no writ of lunacy or other proceeding showing or tending to show that petitioner is in fact insane. The attorney filing the present petition does not show that he has personally made an examination of the mental

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status of the accused, nor is the application fortified by any kind of support or evidence.

It is true that the district attorney in his demurrer challenged the sufficiency of the petition on the ground that the petition shows affirmatively that each and every ground cited therein for the writ of error *coram nobis* existed at the time of the trial and conviction of the defendant, and on other grounds to be shown at the hearing. Under this demurrer, in my opinion, the sufficiency of the petition is challenged, and if it be necessary to support a petition with some preliminary proof or affidavit to show the trial judge that the granting of the writ would properly be warranted, then the petition is not sufficient to warrant the issuance of the writ.

It seems to me that the essence of the writ is very analogous to a motion for a new trial based on newly discovered evidence. Or it is analogous to a proceeding in equity to enjoin a judgment at law or to grant a new trial at law for similar defects existing at the time of the rendition of the judgment, which facts, if established at the time of the trial, would have resulted in all probability in a different judgment being rendered. If the facts now set forth had been discovered before the adjournment of court, manifestly the motion for a new trial would have been the proper remedy, and certainly under the rules applicable to that subject a greater showing would have been required than is contained in the present petition. In other words, in the present case the judge is asked and required by the majority opinion to grant a stay of execution and a hearing on the application on the unsupported statements of the petitioner and the belief of his attorney; said belief of the attorney being based entirely upon the statements of the petitioner.

We must remember that the trial judge, the officers of the court, including the attorneys for the petitioner,

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as well as the general public, had the petitioner before them during the trial, where his appearance, conduct, and general demeanor were under observation by the judge, district attorney, attorneys for the defendant, the juries, and the general public, and that this was followed by a verdict of guilty. We have before us also the record of proceedings at the trial which were necessarily before the trial judge, and we are authorized to presume, and required to presume, in favor of the validity of the solemn judgment of the circuit court, facts which reasonably could appear to the said judge.

It appears from the record of that case that the petitioner testified in his own behalf, giving a full account of his version of the facts leading up to and at the time of the alleged crime, and it seems to me it would certainly appear from his testimony and conduct and demeanor if he was insane that there was something that would indicate it, but, reading the record in the light of the trial and conviction, it is impossible to find anything to suggest the insanity of the petitioner.

It was certainly the duty of the attorneys representing him at that time to confer with him and to use such other available information, as was obtainable before going into trial, and, if there was any truth in the allegations of the present petition, they would be the best witnesses by whom to establish those facts, and that the application ought to be fortified by the evidence of some persons other than the petitioner, and especially of his attorneys who represented him through the trial, and who would have every opportunity of knowing the facts. If a man sentenced to death for murder or other capital offense can postpone the execution of such sentence by a mere ex parte affidavit, unfortified by any other affidavit, it would be a vain and useless thing to sen-

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tence men to die, for what man facing such a dreadful alternative would not file a petition, supported by his own affidavit, to procure a new lease on life and a postponement of the inevitable hour? If the application can be granted now on this showing, and if the circuit judge must try the fact as to the said insanity now alleged to exist, and if an appeal from that judgment may be prosecuted here, what would hinder the filing of a new application on the ground of subsequent insanity to prevent execution after such proceeding? In other words, we would be faced with an endless chain of writs *coram nobis* until the prisoner died a natural death, or until some judge decided the case favorably to him.

I think that a proceeding of this kind requires a strong showing before the writ may issue at all. Ordinarily a judgment cannot be averred against. It usually imports absolute verity as between the parties to it, and before it is set aside or suspended the strongest possible showing should be made on the justness of the proceeding to invalidate or postpone it.

I think my position is supported by the decision of this court in *Holt* v. *State*, 78 Miss. 631, 29 So. 527. In that case Holt was convicted of murder, and the death penalty had been pronounced. The court had adjourned, and application was presented to the circuit judge in vacation for a writ of error *coram nobis* on the ground that some of the jurors were not qualified electors, and on the ground that it had been communicated to the jury before the trial of petitioner that the petitioner had previously killed two men and shot a third before the homicide for which he was tried, which statements were untrue and to his prejudice, depriving him of a fair trial; and because a state's witness had stated to divers persons before the trial that he was not present and knew nothing about the killing, and but for the testimony of this

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witness there would have been no conviction; that he had used due care and diligence and did not know any of these things until after the court which tried him had adjourned. The judge below declined to issue the writ, and the court, in affirming the action of the judge, called attention to the fact that the petition was supported by no evidence except that of the petitioner himself; that neither the witnesses nor their affidavits are produced, and declined to decide whether the writ would lie in a criminal case, and whether the case was appealable or not because of the insufficiency of the petition.

The rule as to what is required on a motion for a new trial on the ground of newly discovered evidence or absent witnesses is laid down in *Lamar* v. *State,* 63 Miss. 265, and approved in *Lea* v. *State,* 64 Miss. 295, 1 So. 244; *Hill* v. *State,* 72 Miss. 531, 17 So, 375; *Borroum* v. *State,* 22 So. 68; *Donald* v. *State,* 41 So. 4—in which it is announced that to entitle the defendant to a continuance because of the absence of a witness, or on the motion for a new trial, he must show that he used all diligence, and show what steps had been taken to secure the attendance of a witness and produce the witness or his affidavit on the hearing of the motion for a new trial. Also *Hare* v. *Sproul,* 2 How. 772; *Rulon* v. *Lintol's Heirs,* 2 How. 891; *Garnett* v. *Kirkman,* 44 Miss. 94; *Bledsoe* v. *Little,* 4 How. 13; *Wright* v. *Alevander,* 11 Smedes & M. 411; *Dean* v. *Young,* 13 Smedes & M. 118.

As to a showing for a new trial in chancery or relief against judgment: *Buckingham* v. *Wessen,* 54 Miss. 526; *Miller* v. *Palmer,* 55 Miss. 323; *Ross* v. *Hollpway,* 60 Miss. 553; *Cotton* v. *Hiller,* 52 Miss. 7; *Stewart* v. *Brooks,* 62 Miss. 492; *Greene* v. *Bank,* 73 Miss. 542, 19 So. 359.

In the *Fugate Case,* 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 436, the petition alleged

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that three of the jurors who tried him had formed and expressed an opinion as to the guilt of the defendant prior to their having been accepted as jurors, and that this was unknown to the petitioner or his counsel until after court had adjourned. The application set out the statement of the jurors and what they testified to on their *voir dire* that they had not formed or expressed an opinion, and affidavits were filed with the petition sustaining the allegations as to what these jurors had stated, the petition averring that neither the appellant nor either of his attorneys knew that said jurors had expressed said opinion until after the adjournment of court, and that they had exercised all due diligence to ascertain the character of the jurors, and could not discover the facts set forth until after the adjournment of the court. The court held the showing was insufficient, and that the trial judge properly denied the writ.

It is difficult for me to see why the writ should not issue in the Fugate Case, if the writ would lie, as well as in the present case. If the jurors were hostile to the defendant and concealed their hostility by false statements on their examination for jury service, it would seem that defendant had not had constitutionally a fair trial. There are methods by which insanity may be established provided by statute, and before the solemn judgment of conviction is suspended or set aside some preliminary proceeding to establish insanity should have preceded the filing of this petition, and at all events, if not filed before, satisfactory sustaining evidence should accompany the petition.

Section 3219, Code of 1906 (section 5561, Hemingway's Code), provided that the chancery court has jurisdiction of writs of lunacy, and provides a proceeding to determine whether or not a person is a lunatic.

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If the petitioner was in fact insane, a verdict under this statute, in my opinion, should accompany the application whenever it may be filed to annul or suspend the judgment. It it well settled in this state that the chancery court has jurisdiction to grant new trials at law in proper cases, and that in order to avail of this jurisdiction there must be a clear showing made.

For the foregoing reasons, I think the judgment of the circuit judge in denying the application and dismissing the petition should be affirmed.

Affirmed.

KING v. STATE.

[83 South. 164. In Banc. No. 20943.]

1. SEDUCTION. *Corroboration.*
   In a prosecution for seduction under promise of marriage under Code 1906, section 1081 (Hemingway's Code, section 808), it is necessary that the testimony of the female seduced be corroborated by other evidence upon the three essential ingredients, of the crime, namely, promise of marriage, the act of sexual intercourse, and the previous chaste character of the prosecutrix.

2. SEDUCTION. *Previous chaste character of prosecutrix question for the jury.*
   In a prosecution for seduction, the question of the previous chaste character of the prosecutrix is a question for the jury.

3. SEDUCTION. *Effect of successive acts.*
   Under Code 1906, section 1081 (Hemingway's Code, section 808), there can be only one seduction, each successive act of intercourse not being an offense.

4. SEDUCTION. *Promise of marriage. Evidence of previous chaste character.*
   In order to sustain a conviction for seduction under Code 1906, section 1081 (Hemingway's Code, section 808), under promises of

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marriage, the jury must believe that there was a promise of marriage made by the defendant to the prosecutrix, and that this caused her to yield her person to him, and they must further believe that at this time the prosecutrix was of previous chaste character.

5. SEDUCTION. *Sufficiency of corroboration.*
Where in a prosecution for seduction under promises of marriage, the mother of the prosecutrix testified that the accused told her that the prosecutrix "was hard to persuade but he did persuade her over, and also that he said he promised to marry her," this was sufficient to corroborate the prosecutrix upon the promise of marriage and act of intercourse.

6. SEDUCTION. *Previous chaste character. Sufficiency of corroboration.*
Where the attorney of accused in a prosecution for seduction asked the mother of the prosecutrix on cross-examination whether or not she was a lewd girl previous to the time of the alleged seduction and her mother replied that she was not, this was sufficient corroboration of the testimony of the prosecutrix that she was of previous chaste character.

7. SEDUCTION. *Burden of proof on state.*
In a prosecution for seduction under promise of marriage the burden of proof is upon the state to establish the three essential ingredients of the crime.

8. SEDUCTION. *Previous chastity. Proof of reputation.*
In a prosecution for seduction, it is competent for the state to prove the general reputation of the prosecutrix for chastity as one of the elements of proof of actual chastity.

9. SEDUCTION. *Evidence of declarations of prosecutrix in travail.*
In a prosecution for seduction, it was error to permit the mother of the prosecutrix to testify over objection, that the prosecutrix stated while in travail that accused was the father of the child, where it was not contended that the prosecutrix became pregnant as the result of the first act of intercourse, but that her pregnancy was caused several weeks later though such testimony would be admissible in a bastardy proceeding.

10. CRIMINAL LAW. *Granting of instruction during argument.*
It was error for the court to grant an instruction for the state during the argument of counsel for the defense to the jury, where he did not know of the granting of such instruction and had no opportunity to refer to the same in his argument.

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11. SEDUCTION. *Misleading instruction.*

In a prosecution for seduction it was error to instruct the jury to convict "if they believed that defendant did have intercourse with the prosecutrix at a time she was of previous chaste character at any time within two years prior to the date named in the indictment as charged in the indictment" such an instruction should have stated that such intercourse was had under promise of marriage, or should have used the word "seduce" to make clear that seduction and not intercourse, was the question.

APPEAL from the circuit court of Covington county. HON. W. H. HUGHES, Judge.

Hulon King was convicted of seduction and appeals. The facts are fully stated in the opinion of the court.

E. L. Dent, for appellant.

The statute under which appellant was tried, section 1081, Code 1906, and section 808, Hemingway's Code, says that "the testimony of the female seduced alone shall not be sufficient for conviction." It will be noted that there are three elements of this crime: viz: 1st, that the female under the age of eighteen years was of previous chaste character immediately preceding the offense; 2nd, that the illicit connection or intercourse was brought about by means of persuasion, solicitation, promises, bribes or other means without the employment of force. All three of these elements must be proven by the state beyond a reasonable doubt before a legal conviction can be had, and the testimony of the prosecutrix alone shall not be sufficient to so establish either one of these elements. There is not the slightest evidence in this record to corroborate the prosecutrix that she was of previous chaste character, and no attempt was made by the state to make such proof. Section 1081, Code 1906, sec. 808, Hemingway's Code, seduction of female child

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under eighteen, and section, 1088, Hemingway's Code 1372, Code 106, seduction of a female over eighteen, are the necessary complements of each other. One punishes the seduction of girls under seventeen by any means, the other, seduction of females over seventeen by means of a promise of marriage. Seduction is the substantive thing punished. See *North* v. *State,* 16 So. 264, also concurring opinion in same case, 18 So. 916. Previous chaste character is as essential under one statute as under the other. Likewise is the corroboration of the prosecutrix essential under one statute as under the other. In this case the state relying wholly on a promise of marriage, it is immaterial whether the authorities cited should come under one or the other of these statutes. The degree of proof as to previously chaste character under both statutes is the same, and as there has been more cases tried probably under the latter statute, it follows that the number of cases cited may be more under that statute. In the case of *Carter* v. *State,* 54 So. 805, this court held on this very point the following: "The uncorroborated testimony of the woman is insufficient to convict. The allegation of the indictment that she was of previous chaste character, 'and that the carnal knowledge was obtained by virtue of a false or feigned promise of marriage' cannot be maintained on the testimony of the prosecutrix alone. The prosecutrix must be corroborated by evidence upon these two points. Such is the burden, so to speak, placed upon the state in cases of this character." Likewise in the case of *Fooshee* v. *State,* 82 Miss. 509, this court holds, that the previous chaste character of the woman is an essential element of the crime, and proof thereof is essential to conviction. In the case of *Hatten* v. *State,* 49 So. 514, which is a somewhat similar case to the one at bar, in that case Hatten did not testify in his own behalf, and the testimony of

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the prosecutrix was unsupported, except by circumstances. The appellant here did not testify, and the testimony of Lillie Cook, the prosecutrix is unsupported, except by circumstances in the way of conversation or statements made by appellant after he was arrested for bastardy and on his trial before Justice of Peace CAMPBELL when he was trying to get his case continued. In this *Hatten case, supra,* this court said: "The evidence in this case falls far short of making out the crime of seduction as known to the law." No case, we apprehend, can be anywhere found which would sanction a conviction for seduction on the scant and utterly insufficient testimony disclosed by this record." In the case of *Ferguson* v. *State,* 15 So. 66, on the competency of the testimony of the prosecutrix, this court held: The third assignment challenges the propriety of the trial court's permitting the female seduced to testify as to acts of sexual intercourse between herself and the prisoner and as to the birth of her child, subsequent to her seduction. There was no controversy as to these facts. The repeated acts of sexual intercourse were testified to by the accused, and the birth of the child was not disputed. The evidence, we think was incompetent, either as connecting the accused with the crime of seduction or as corroborating the evidence of the female seduced."

The statements made by appellant as testified to by prosecutrix her mother, Mrs. Mary Jane Cook, and witness Campbell, that he would marry the prosecutrix, with knowledge of her pregancy under the circumstnces as disclosed by this record, are wholly insufficient to amount to corroboration of the prosecutrix. This identical question was passed upon by this court in the case of *Long* v. *State,* 199 Miss. 7, 56 So. 185, the court through Chief Justice SMITH, saying: "This evidence was competent, but of itself alone was wholly

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incufficient to amount to corroboration of the prosecutrix. This evidence goes to substantiate only one of the essential elements of the crime, and that is that the illicit connection was brought about by means of persuasion, promises, etc; it does not in any way prove previous chaste character, neither does it in any way connect appellant with illicit connection with the prosecutrix. Such evidence does not corroborate the prosecutrix as to these two vital and essential elements of the crime. The corroborating evidence required by the statute must be of such character as will fairly tend to connect the appellant with the commission of the offense. In the case of *Terry* v. *State,* 52 So. 483, this court held; "our statutes provide that she must not only be of previous chaste character, but that the testimony of the female seduced alone shall not be sufficient to convict. This is a wise and wholesome provision of the law, it guards against, or rather minimizes, the chances of an innocent party being accused and convicted."

The first assignment of error is well taken, as when the state rested its case, without any kind or character of proof to corroborate the prosecutrix in the illicit connection or that she was of previous chaste character, appellant made a motion to exclude the evidence offered on the part of the state and that the court direct a verdict of acquittal. In the case of *Reddick* v. *State,* 72 Miss. 1008, this court announced the correct practice. When the state rested and no case was made out against the prisoner, a peremptory charge should have been given to return a verdict of not guilty. Appellant should be discharged by this court on the first assignment of errors. This court should do what the court below should have done, and that is sustain the motion of appellant for a peremptory instruction to find him not guilty and that he be ordered discharged. *Hatton* v. *State,* 95 Miss.

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546, 49 So. 514; *Hatton* v. *State,* 92 Miss. 951, 46 So. 708; *Terry* v. *State,* 97 Miss. 472, 52 So. 483; *Carlisle* v. *State,* 73 Miss. 387, 19 So. 207; *Ferguson* v. *State,* 71 Miss. 805, 15 So. 66; *Norton* v. *State,* 72 Miss. 128, 16 So. 264, 18 So. 916; *Carroll* v. *State,* 74 Miss. 688, 22 So. 295; *Fooshee* v. *State,* 82 Miss. 509, 34 So. 148; *Hoff* v. *State,* 83 Miss. 488, 35 So. 950; *Williams* v. *State,* 92 Miss. 70, 45 So. 146; *Carter* v. *State,* 99 Miss. 206, 45 So. 805; *Long* v. *State,* 100 Miss. 7, 56 So. 185; *Lewis* v. *State,* 72 So. 241.

If your humble pleader should be mistaken as to what this court should do on the first assignment of error, he earnestly insists that he cannot possibly be mistaken when we reach the second assignment of errors, and that is after all the evidence was in, that a peremptory instruction should have been given for the defendant, appellant here.

The law is so well settled in this state that I deem it needless to protract this brief on this point. But I will call the court's attention to the fact that appellant did not testify in his own behalf, and was contented to rest his case on the testimony of five young men whose testimony is unimpeached, and they all swore that they had either had sexual intercourse with the prosecutrix about the time and prior to the time she says that she was seduced, or that they had seen her having sexual intercourse with other young men. She says that she was not, seduced in January but in February, 1918, yet she says that appellant had had sexual intercourse with her in January, and that this occurred several times before she was really seduced in February. If we should rely on her testimony at all, we are brought to the conclusion that she had had sexual intercourse with appellant several times before she says she was seduced. If that is true, and she says it is, she was not of previous chaste character in February when she says she was seduced.

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It would be but the natural thing for her to deny that she had had sexual intercourse with the young men witnesses; she would have denied it to her mother in July but for the fact of her pregnancy. The mother wanted her daugther, the prosecutrix, to marry appellant, and when she learned that appellant was going to see another young lady, and that her daugther was pregnant, then it was her move, and by force and intimidation she could halter appellant. "There is no hell like a woman scorned." The state's pretended evidence in rebuttal showed nothing unless it was the fact that other young men had the same opportunity to have gotten prosecutrix pregnant as did the appellant. The evidence in this case might have made out a case of bastardy, but it certainly does not of the serious crime of seduction. On this assignment of errors, I desire to quote from one case and that is the case *supra, Lewis* v. *State,* 72 So. 241.

"There was no corroboration, either as to act of intercourse, a promise of marriage, or previous chaste character," and that the defendant was entitled to a peremptory instruction. The attorney-general conceded that proposition. The only corroboration of the prosecutrix is about the promise of marriage, and that was under such circumstances as shown by the record, that it would be a manifest injustice to appellant, and the other young men of the country to permit such circumstances to be persuasive and determine their liberty when pursued by a supposed ingenious woman or two, mother and daughter, as in this case. Not speaking from personal experience but from what I glean from the books and the opinions of this court, that cases of this character are "easily manufactured but hard to defend." I, indeed, would be far from doing the woman an injustice, but I do not believe there is a virtuous sixteen-year-old girl in this state or any other state when imposed on by some

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unscrupulous boy or man and begotten with child who could not get her neighbors and acquaintances to appear in court and testify that she was of previous chaste character. Not so in this case. They got Mr. Page who does not know and the doctor who lives eighteen miles away and never knew the girl until called on to visit her in sickness and the state introduces these two witness pretending they are in rebuttal, what a farce. But it only goes to show that "the wicked knoweth not what they do." With these remarkes I submit the cause of appellant, a son of one of the best families in error is concerned. A peremptory instruction should have been given by the court below, and as it did not give it, this court should, and discharge the defendant, with this observation and I conclude with the second assignment of error. The further the courts get awey from the doctrine of *"stare decisis"* the less respect the populace will have for the courts and the law. The case of *Rogers* v. *State,* 72 So. 198, should be ample authority to discharge appellant. With this *Rogers case,* and the *Lewis case, supra,* and all the other authorities cited and the reason for the law, should be so persuasive to this court as abundant and ample authority to discharge the appellant, and such action, your humble pleader shall reasonably expect on this second assignment of errors.

As to the third assignment of errors wherein the court below permitted the testimony of Mrs. Mary Jane Cook, the mother of prosecutrix, to go to the jury over objections of appellant as to what her daughter said during travail as to who was the father of her child. I submit that this was manifest error. This is permissible in a bastardy case but not in a case of seduction. See case of *Johnson* v. *Walker,* 86 Miss. 757, 39 So. 49, 1 L. R. A. (N .S.) page 470. This court held among other things the following: "With

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out this statute, the mother's death bed declarations as to the paternity of the child were generally held to be inadmissable. 5 Cyc. Law & Proc., p. 661, note. The sole and only object of the statute was to extend the doctrine as to dying declarations to such declarations of the mother in bastardy proceedings, and to place beyond controversy their admissibility, not merely as corroborative, but as original and substantive evidence." The statute referred to is section 276, Code 1906, sec. 225, Hemingway's Code. I respectfully submit that this was hearsay evidence and not permissible under any rule of evidence in a seduction case. The prosecutrix swore that she was unconcious when the child was born, she was asked this question: Q. "You was unconscious when it was born? A. Yes, sir." She did not know whether her child was born dead or alive, and to make the testimony of the interested and anxious mother as to what the prosecutrix said as to who was the father of the child when she did not know what she was saying, appears to be not in keeping with any rule of reason, but is manifestly calculated to prejudice the cause of appellant. I respectfully submit that the admission of this evidence by the court below was manifest error, and for this error alone should cause a reversal of this case.

The fourth assignment of erorrs challenges the first and only properly given instruction for the state. It appears that this instruction affirmatively tells the jury that Lillie Cook, the prosecutrix, is a female under the age of eighteen years and of previous chaste character because the indictment so alleges. The charge should have been "if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Hulon King, by reason of a promise of marriage did have sexual intercourse with Lillie Cook a female under the age of eighteen years, at a time when she was of previous chaste character, it would

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be the duty of the jury to convict. She was certainly not of previous chaste character because it was alleged in the indictment.

The fifth assignment of error challenges the sufficiency of the evidence to convict appellant, and I respectfully submit if there was no other error in this record, that this assignment is well taken, and on this alone appellant should be discharged. The testimony of prosecutrix is not corroborated as to previous chaste character, neither as to the illicit connection, the two most essential elements of the crime, but on the contraary five young men swear emphatically and certain that she was not of previous chaste character. The testimony of these young men stand unimpeached and unshaken by the rigid cross-examination they underwent while relating their experience with the prosecutrix and such straight, unimpeached testimony should convince the mind of any reasonable man that the prosecutrix was unworthy of belief. The mother of prosecutrix and witness Page say that these young men were there and had the opportunity. The prosecutrix says that some of them tried to make love to her, and that most of them went with her as lovers. While I deeply appreciate the day is almost at hand when women will rule, but I cannot appreciate that an unhappy day is approaching when a lewd woman will be permitted to ruin. If human testimony is to be believed and the unchastity of woman to be condemned, this is certainly a case where there is insufficient evidence to convict, and I respectfully submit that this assignment of error is well taken, and that the appellant should be discharged.

The sixth assignment of errors challenges the action of the court below in granting an instruction for the state at a time and under the circumstances as shown by the special bill of exceptions specially referred to in

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said assignment of errors. This was manifest error for which this cause should be reversed if there should be no other in this record. See *Montgomery* v. *State,* 85 Miss. 330. Wherein this court severely condemns such practice, and it would prolong this brief too much to quote therefrom, so, I shall respectfully ask this court to read this Montgomery case in connection with the said special bill of exemptions so referred to.

As to the seventh ssgnment of errors, this being a typical case of bastardy, if anything, the court below should not have refused the following instruction: "The court charges the jury that the question of bastardy cannot be considered in the trial of this case." I am unable to appreciate why this instruction was refused but I do appreciate how the refusal thereof contributed very manifestly to the prejudice of appellant, because perhaps the jury thought that because appellant was the father of the child that he should be convicted for seduction. Appellant has been discharged by a jury on practically the same evidence in the bastardy case. That was manifest error, and if for no other reason, this cause should be reversed.

R M. Bourdeaux, Assistant Attorney-General, for the state.

Counsel for appellant seems to insist that the defendant in the court below was entitled to a peremptory instruction because the evidence for the state shows, as he understands it, that the defendant had sexual intercourse with Lillie Cook in January and did not make the promise of marriage until February and that therefore Lillie Cook could not have been of previous chaste character.

Section 1981 of the Code of 1906, uses the word "seduce" but does not make it necessary that the

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seduction be by means of a promise of marriage. Black's Law Dictionary defines seduction: "To entice a woman to the commission of fornication or adultery by persuasion, solicitation, promises, bribes, or otherwise."

While we do not think that a promise of marriage is necessary to be proven in a prosecution under section 1081, that is to say, we do not think that a promise of marriage is the only means of seduction, yet we do not think that the state could make out a case merely by proving an act of intercourse by a man with a girl under the age of eighteen years, because it is possible for the act of intercourse to have been indulged in and induced by the illicit desire of the female as much so as by that of the male.

But in this case, we do not think that this question is material and we think that the trial court was eminently correct in refusing the peremptory instruction for the defendant, because the only reasonable interpretation that can be put on the testimony of Lillie Cook as reflected by pages six and seven of the record in this case is that the promise of marriage was made before the first act of intercourse in January, 1918; and that the promise to marry was made to be consummated in February.

In addition to the proof by Lillie Cook of the promise of marriage before the first act of intercourse just referred to, we have some evidence in this record of persuasion, for Mrs. Cook the mother of the girl, testified that the defendant told her she (referring to Lillie Cook) was hard to persuade but he did persuade her over. R. 37, top of page.

Assuming that the case was correctly submitted to the jury on proper instructions and that no other error occurred during the trial of the case, we are deeply impressed with the conviction that the facts of this case as reflected by the record makes such a

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case as will amply support a verdict of guilty, if the jury believe the witnesses for the state, or on the other hand will support a verdict of not guilty if the jury believe the witnesses for defendant, and it occurs to us that the jury in this case accepted as true the testimony of the state's witnesses and rejected as false and untrue the testimony of the witnesses for the defendant.

I do not think that any of the objections urged against the instructions given for the state are well taken. A common sense interpretation of the one chiefly assailed does not, in our opinion, make it assume that Lillie Cook was a previous chaste character but makes it necessary for the jury to believe from the evidence beyond a reasonable doubt that the defendant Hulon King not only had intercourse by reason of a promise of marriage, but also that Lillie Cook was a female under the age of eighteen years and of previous chaste character, before they could convict.

Counsel for appellant urges that this case should be reversed because of the time in which a certain instruction was given for the state and files a special bill of exceptions showing that during the argument of counsel for defendant and without his knowledge the state procured an additional instruction from the court, and the first counsel for defendant knew of it, was when the attorney for the prosecution read it to the jury. There is no doubt but that this court has severely criticized, as being unfair and improper, such conduct on the part of the trial court in the case of *Montgomery* v. *The State,* 83 Miss. 330. But the court says in that case they would not reverse alone because of the time in which the instruction was given if the instruction itself had correctly announced the law. But in that case they would reverse not only because of the time in which the instruction was given but, further because the instruction was so adroitly drawn as

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to mislead the jury. We submit that in the case at bar the instruction given out of time correctly announced the law and that this court should be slow to disturb the exercise of the discretion of a trial court with respect to the time of giving a proper and correct instruction.

Counsel for appellant further urges that Lillie Cook is not corroborated and for this reason he urges a reversal of this case and cites a great many cases. Of course, every case must stand on its own peculiar facts and circumstances and in *Lewis* v. *State,* 72 So. 241, absolutely no facts are given but the court holds that under the facts of that case there is no corroboration; and also in *Hatton* v. *State,* 95 Miss. 546, the court held that there was no seduction under the facts of that case; and in *Carter* v. *State,* 99 Miss. 206, the court holds that there was no corroboration of the prosecutrix, but absolutely none of the facts were given.

None of those cases could serve as authority in the case at bar, because in two of them no facts whatever were given and in Hatton case the facts were wholly dissimilar to the case at bar.

In *Long* v. *State,* 100 Miss. 7, the court holds that the mere promise of marriage while admissible, is not sufficient corroboration. In the case at bar, the prosecutrix is corroborated by her mother who testified to an admission on the part of the defendant in the court below to the following facts: That he had ruined the girl. That he promised to marry her. That she was hard for him to persuade, but that he did persuade her over and that he would take her and take care of her.

There were two witnesses introduced by the state as to the reputation of the girl for chastity. Certainly the impossible is not required of the state as to the reputation of the girl for chastity. Certainly the im-

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possible is not required of the state in a seduction case, but as said in the *Long case, supra,* there is enough corroboration, which, if believed, will show that the prosecutrix was telling the truth. Counsel for appellant further urges that it was reversible error on the part of the court in refusing a certain instruction for the defendant, which said instruction merely announced an abstract proposition of law.

Assuming that this refused instruction correctly announced the law, our court has repeatedly held that the refusal of an instruction merely announcing an abstract proposition of law is not reversible error and especially in a case where the jury is otherwise properly instructed.

In conclusion, permit me to suggest that this is a controversy between the state of Mississippi and Hulon King and not between Lillie Cook and Hulon King.

SYKES, J., delivered the opinion of the court.

Hulon King was indicted and convicted in the circuit court of Covington county of the crime of seduction, and sentenced to a term of two years in the penitentiary. From which judgment this appeal is prosecuted. The indictment was drawn under section 1081, Code of 1906 (Section 808, Hemingway's Code). Omitting the formal parts, it alleges that: "Hulon King an unmarried man, on the ——— day of February, 1919, in Covington county, aforesaid, did then and there unlawfully, wilfully, and felonious seduce and have illicit intercourse with Lillie Cook, a female child, under the age of eighteen years, of previous chaste character."

This section of the Code provides that: "The testimony of the female seduced alone shall not be sufficient for conviction."

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The opinion of the court in the case of *Carlisle* v. *State,* 73 Miss. 387, 19 So. 207, quotes with approval from the opinion of the court in the case of *State* v. *Bierce,* 27 Conn. 319, the definition of the word "seduce," as used in a similar statute as follows:

"The word 'seduce,' although a general term and having a variety of meaning according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a female, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated. The word 'seduction,' used in reference to a man's conduct towards a female, *ex vi termini,* implies sexual intercourse between them." Bishop on Statutory Crimes, section 645.

In this case it is the contention of the state that the appellant persuaded the girl to have sexual intercourse under a promise of marriage.

This court, in dealing with this section and other kindred sections of the Code, has repeatedly held that it is necessary that the testimony of the female seduced be corroborated by other evidence upon the three essential ingredients of the crime; namely, in this case promise of marriage, the act of sexual intercourse, and the previous chaste character of the prosecutrix. *Lewis* v. *State,* 111 Miss. 833, 72 So. 241; *Hatton* v. *State,* 92 Miss. 63, 46 So. 708; *Id.,* 95 Miss. 646, 49 So. 514; *Carter* v. *State,* 99 Miss. 207, 54 So. 805; *Long* v. *State,* 100 Miss. 15, 56 So. 185.

It is the contention of the appellant: First, that the testimony of the prosecutrix herself showed that she was not of previous chaste character at the time she claims to have been seduced by the appellant. This

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contention is based upon some parts of the testimony of this witness wherein she stated on cross-examination in effect that she was seduced in February, but also that she had had intercourse with appellant in January. In other parts of her testimony, in her examination in chief, however, she expressly stated that appellant promised to marry her both before and after she had intercourse with him. Without reciting her testimony in full, suffice it to say that the jury had a right to believe from her testimony that the promise of marriage was made in January before the first act of intercourse. They could very well have believed from her testimony that her idea of what seduction means was when she became pregnant. It was for the jury to say and consider this testimony and reconcile it if possible. It is well settled that there can be only one seduction, and that each successive act of intercourse is not an offense under this statute. *Hatton* v. *State*, 92 Miss. 653, 46 So. 708; *Id.*, 95 Miss. 546, 49 So. 514.

The jury in this case must believe from the testimony before a conviction can be had that the promise of marriage was made by appellant to prosecutrix, and this caused her to yield her person to him. *Hatton* v. *State, supra.* They must further believe that at this time the prosecutrix was of previous chaste character.

The appellant contends that he should have been discharged in the lower court after the state rested its case, because there was no testimony corroborative of that of the prosecutrix as to the promise of marriage, the act of intercourse, and the previous chaste character of the prosecutrix. The mother of the prosecutrix, however, testified that the appellant told her the prosecutrix "was hard to persuade, but he did persuade her over . . . and also that he said he promised to marry her." This testimony alone was sufficient to corroborate the prosecutrix upon the promise of mar-

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riage and the act of intercourse. As to the previous chaste character, the attorney for the appellant himself asked the mother of the prosecutrix on cross-examination whether or not she was a lewd girl previous to the time of the alleged seduction, to which the witness replied that she was not. The girl testified to her previous chastity. We think this testimony was a sufficient corroboration on this point.

The state further introduced two witnesses in rebuttal, who testified, when asked if they knew the general reputation for chastity of the prosecutrix, that they had never heard her reputation questioned until her conduct here in question became known in a prosecution under this statute the burden of proof rests upon the state to prove the three essential ingredients of this crime, and in proving the actual chastity of the prosecutrix it is competent to prove her general reputation for chastity, as one of the elements of proof of actual chastity. In the case of *Carroll* v. *State*, 74 Miss. 688, on the bottom of page 690, 22 So. 295, 60 Am. St. Rep. 539, the opinion of the court quotes from *State* v. *Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656 as follows:

"General reputation must be regarded as having some relation to actual character, and goes directly to the question of the probability of her being chaste."

It is also assigned as error that the mother of the prosecutrix was permitted to testify over objection that the prosecutrix stated while in travail that appellant was the father of her child. The admissibility of this testimony was error. This character of testimony is admissible in a bastardy proceeding where the paternity of a child is a material issue. *Johnson* v. *Walker*, 86 Miss. 757, 39 So. 49, 1 L. R. A. (N. S.) 470, 109 Am. St. Rep. 733. In this case, however, it was not contended by the prosecutrix that she became pregnant as a result of the first act of intercourse, but

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that her pregnancy was caused several weeks later. *Ferguson* v. *State,* 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492. Upon this error alone, however, we would not be disposed to reverse the case.

The facts relating to the assignment of error upon which this case must be reversed as shown by a special bill of exceptions, in substance, are as follows: While the attorney for appellant was arguing the case to the jury, claiming that under the testimony of the prosecutrix herself she was not of previous chaste character when she claimed to have been seduced, because she had previously had intercourse with the appellant in January and for this reason the jury should return a verdict of not guilty, one of counsel for the state without the knowledge of defendant's counsel asked and was granted by the court the following instruction:

"The court instructs the jury for the state that it is immaterial whether the intercourse charged was in January or February, 1918. If the jury believe beyond a reasonable doubt from the evidence that the defendant did have intercourse with prosecutrix at a time she was of previous chaste character, at any time within two years prior to the date named in the indictment as charged in the indictment, you should find defendant guilty."

Counsel for the appellant was ignorant of the granting of this instruction until the concluding argument was being made for the state, when this instruction was read to the jury, and counsel remarked that, "The court has given you its instruction for the state to answer the argument of counsel for the defendant, so you gentlemen may not pay any attention to what he said." Objection was immediately made to this instruction being read to the jury, which was overruled. The granting of any instruction during the argument to the jury, and especially when opposing

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counsel will have no opportunity to refer to same in his argument, has been expressly condemned by this court in the opinion in the case of *Montgomery* v. *State,* 85 Miss. 330, 37 So. 835. The instruction granted in the Montgomery Case was practically under similar circumstances as those here occurring. In that case the court said that where the charge was clearly right, and not so adroitly prepared as to possibly mislead the jury, it would not reverse for a deviation from it.

The above instruction is not clearly right, and, to say the least, is misleading. The state was only granted two instructions. The other instruction was correct. The instruction we are now considering, however, in effect authorizes the jury to convict appellant if they believe he had intercourse with prosecutrix at a time when she was of previous chaste character, within two years prior to the date named in the indictment. The statement "as charged in the indictment" either means nothing, or is misleading. This instruction should have contained the *sine qua non* of the offense, namely, that the intercourse was the result of a promise of marriage, or should have used the word "seduced" to let the jury understand that the seduction was the question before them, and not simply the intercourse. We therefore hold that this instruction was granted at an improper time, and, further, that it is an improper instruction, and should not have been granted.

The case is a very close one on its facts. Five disinterested young men testified to the lewd character of the prosecutrix. Four of them testified that they had had several acts of sexual intercourse with her prior to and about the time she claims to have been seduced. The corroborating testimony in the case, though sufficient to sustain the verdict, is one of the strongest character. This being true, we think the defendant was made to carry more of a burden than he should

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in the manner in which it was given and in the wording of this incorrect instruction.

Reversed and remanded.

ETHRIDGE, J. (specially concurring).

I base my concurrence in reversal entirely upon the fact that the instruction criticized in the majority opinion was given without knowledge of counsel for the defendant until after he had closed his argument. While the court may give the instruction during the argument or at any time before the jury retires, the attention of counsel for the opposing side should be promptly called to the giving of the instruction, and he should be given opportunity to procure a counter instruction and to reshape his argument, if necessary. I do not think the instruction given is erroneous or ambiguous. It might be more explicitly phrased, but if the instruction had been given prior to the argument, or if the attention of counsel had been called to it before he concluded his argument, and he given an opportunity to answer it and to procure other instructions if he deemed it advisable, I should unhesitatingly vote for the case to be affirmed.

In the case at bar the only element of the crime charged which was disputed by the defendant was with reference to her previous chastity, and the instruction given required the jury to find that this existed beyond a reasonable doubt. The phrase "as charged in the indictment" necessarily means the elements of crime must be proven that are charged in the indictment. I think the criticism of the instruction is too critical, and I fail to see how any man with common sense could be misled by this instruction, especially when it is considered with all the other instructions in the case, as it must be.

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EVANS v. STATE.

[83 South. 167, In Banc. No. 20811.]

LANDLORD AND TENANT. *Inducing Tenant to breach contract.*

The mere hiring of a tenant, who had already broken his contract with his landlord before he had entered upon such contract, was not a violation of Code 1906, section 1146 (Hemingway's Code, section 874), penalizing efforts to persuade tenant to breach his contract.

APPEAL from the circuit court of Marshall county. HON. C. LEE CRUM, Judge.

LESTER G. FANT, for appellant.

Our contention is, in regard to the written contract, first, that the contract is too indefinite to be binding under the section of the code proceeded under, which is as follows: Section 1146, Code 1906.

"Enticing servants: If any person shall wilfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord, etc. . . .

The written contract did not specify any certain time but was indefinite in its terms. It does not state the terms of the contract as to wages, etc., nor the time it is to run but leaves it indefinite. In addition to this, the prosecuting witness testimony as has been shown above, stated that this contract had been abrogated. The next contract which is alleged to have been made in the field in October or November, 1918, as a share cropper, for the year 1919 had not begun.

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Dora Oglesby had not begun the service for the year 1919 and consequently the appellant could not have been convicted for enticing her away before 1919 begun. See case of *Hendrix* v. *State*, 79 Miss. 368, where the court holds that there cannot be any enticing before the contract begins, nor any breach of a contract before it begins.

Notwithstanding the fact that the defendant had a right to be told exactly what the offense was that he was charged with, he was forced to go to trial at this time and stay throughout the trial without any election on the part of the state, for which contract he was going on. Whichever contract they were going on, the defendant was entitled to be discharged because the written contract, so called, had been finished and abrogated, and the new contract had not yet begun.

The charge granted the state is objectionable for many reasons. For the convenience of the court we quote the charge here: "The court instructs the jury for the state that if you believe from the evidence beyond a reasonable doubt that Dora Oglesby was under a contract as a laborer with J. W. Henderson, and that before said contract had expired, the defendant, A. B. Evans, either wilfully interfered with, enticed away, knowingly employed, or induced said Dora Oglesby to leave the employment of said J. W. Henderson, then you will convict said defendant and the form of your verdict should be: "We, the jury, find the defendant guilty as charged."

The charge is vitally defective because it attempts to state facts and does not state all the facts, and charges that before said contract had expired the defendant either wilfully interfered with, enticed away, knowingly employed or induced said Dora Oglesby to leave the employment of J. W. Henderson, "then you will convict said defendant," leaving it to the jury to

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convict this defendant even though the employment had not yet begun.

There is absolutely no doubt in the statement of the case by the prosecuting witness that the written contract had been abandoned and that neither he nor Dora Oglesby considered themselves bound by it, and the oral contract had not yet begun, so it is very apparent that appellant was convicted without a syllable of testimony to show his guilt and should have been granted his discharge by the court at the conclusion of the testimony of the state and a peremptory instruction should have been given in view of the record in this case absolutely disclosing that there could not be any guilt, we respectfully request the court to reverse this case and dismiss the affidavit against appellant here.

Ross A. Collins, attorney-general, for the state.

In our opinion, this appeal presents one simple proposition of law. There is no doubt but that the appellant in this case knew of the relations existing between Mr. Henderson and Dora Oglesby, and so knowing same, he deliberately moved her from Mr. Henderson's place to his place.

As we understand the record, the question of law presented by this appeal is: Does the certificate of employment, herein before set out, coupled with Dora's relations with Mr. Henderson on November 23, 1918, constitute such a contract as is contemplated by section 1146 above quoted?

Respectfully submitted.

COOK, J., delivered the opinion of the court.

In December, 1916, one Dora Oglesby entered into a written contract with J. W. Henderson, a land-

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holder in Marshall county, whereby she bound herself and children to work with Mr. Henderson for four or five years. The contract was in these words:

Potts Camp, Miss., 12—20—16.

"This is to certify that Dora Oglesby has contracted with J. W. Henderson for her and her children to work with said J. W. Henderson for four or five years, said Dora Oglesby and children to work by the day.

her

DORA X OGLESBY."

mark

It seems that Dora and the children remained on Mr. Henderson's place until the fall of 1918. The evidence discloses that Dora did but little actual work; she cooked for and carried food to the children at work in the field. In the fall of 1918, according to the evidence of the state, the written contract was abrogated by the parties, and a verbal contract made, whereby Dora Oglesby bound herself and children to cultivate Mr. Henderson's land on shares.

On or about the 23d day of November, 1918, Dora left Mr. Henderson and moved on the plantation of Mr. Evans, the appellant. The evidence for the state also shows that Mr. Henderson told Mr. Evans that he had contracted with Dora to work a share crop on his land in 1919. It will be seen that Mr. Evans hired Dora before the beginning of Dora's 1919 contract with Mr. Henderson.

The prosecution of this case is based upon section 1146, Code of 1906 (section 874, Hemingway's Code), which is as follows:

"If any person shall willfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the lease premises, before the expiration of his contract without the consent of

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the employer or landlord, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and in addition shall be liable to the employer or landlord for all advances made by him to said renter or laborer by virtue of his contract with said renter or laborer, and for all damages which he may have sustained by reason thereof. The provisions of this section shall apply to minors under contract made by a parent or natural guardian."

In this connection it may be said that the evidence does not show that the appellant "willfully interfered with," or "enticed away," Mr. Henderson's tenant. The evidence shows without doubt that Dora left Mr. Henderson on her own accord and before she had entered upon her alleged contract for the year 1919; that she sought Mr. Evans, and told him that she would not go back to Mr. Henderson, and so Mr. Evans made a contract with her to work for the year 1919.

The question for our decision is about this: Does the mere hiring of a tenant, who has broken his contract with his landlord before she had entered upon the alleged contract, constitute a violation of section 1146, Code of 1906? The section of the Code was designed to stabilize the agricultural industry, the chief industry of the state, and to this end the legislature penalized all efforts of one farmer to persuade the tenants of another farmer to "jump their contracts." The agricultural labor of the state is overwhelmingly of African descent. They are credulous and fickle, and are easily persuaded, and thus for the common good this statute was enacted.

At various times this court has been called upon to construe these statutes. In *Hendricks* v. *State,* 79 Miss. 368, 30 So. 708, the court put a strict construction upon a similar statute in favor of the defendant. In *Alford* v. *Pegues,* 92 Miss. 561, 46 So. 76, the present statute was under review. In that case a

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civil suit was instituted against the alleged offender of the statute. In that case the court said: "There is no question in the world of any enticing away of Alford's laborer or tenant in this case."

The same may be said of this case. In this case, as in the case just mentioned, the tenant had terminated her contract with her landlord, and she had never entered upon her alleged contract. It thus appears that this court has strictly construed this statute, and rigidly held each case within the literal terms of the statute, and always in favor of the accused.

The tenant in the present case had, of her own accord and for reasons satisfactory to herself, decided she would not carry out her contract. She had left her landlord definitely and for good. She sought the appellant and asked for employment, and, after ascertaining that she would not carry out her contract, appellant employed her.

This court in *State* v. *Armstead,* 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495, declared section 1147, Code of 1906, to be in violation of section 15 of our state Constitution, as well as the Constitution of the United States. The section under review in that case was a part of the scheme to protect employers of labor, and while the decision does not necessarily control this case, yet it does preserve inviolate the right of contract, even with an ignorant share cropper or lessee.

We do not believe that it was the intention of the legislature to penalize the acts of the appellant disclosed by this record. He merely made a contract with a tenant who had abandoned her contract before she had entered upon it, without the advice or suggestion of appellant. The contract which it was alleged that appellant made with the tenant was made before the tenant "had ever" entered upon her contract with her former landlord, and contracts under such cir-

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cumstances as this must be strictly construed against the penalty. *Alford* v. *Pegues*, 92 Miss. 558, 46 So. 76.

Reversed and dismissed.

Liverpool, London & Globe Ins. Co. v. Kosciusko and S. E. R. Co.

[83 South. 305, In Banc. No. 20874.]

Railroads. *Evidence making origin of fire question for the jury.*

Where in a suit to recover damages against a railroad company for damages for the loss of a warehouse by fire, the evidence, by a process of exclusion of all other probable causes of the fire, together with evidence tending to show with a reasonable degree of certainty, that the sparks issuing from an antiquated locomotive of defendant set fire to the building, in such case the question of the origin of the fire should be submitted to the jury under the instructions of the court.

Appeal from the circuit court of Attala county.
Hon. T. L. Lamb, Judge.

Suit by Liverpool, London & Globe Insurance Company against the Kosciusko & South Eastern Railroad Company. From a judgment for defendant under a peremptory instruction, plaintiff appeals.

The facts are fully stated in the opinion of the court.

D. H. Glass and *G. J. Smythe*, for appellant.

S. L. Dodd and *Green & Green*, for appellee.

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Cook, J., delivered the opinion of the court.

A certain warehouse and its contents were destroyed by fire. The Liverpool, London & Globe Insurance Company had issued a policy insuring from loss by fire the personal property located in the warehouse, and the Home Insurance Company insured the house itself. The owners of the property destroyed assigned their claims against the railroad company by way of subrogation.

It will be unnecessary for this court to go into the detailed evidence presented to the jury tending to show that sparks from the locomotive of the defendant caused the fire. At the close of the plaintiff's case, the trial judge granted an instruction to the defendant, peremptorily directing the jury to return a verdict for the defendants.

In our opinion, the evidence, by a process of exclusion of all other probable causes of the fire, together with the evidence tending to show, with a reasonable degree of certainty, that the sparks issuing from the antiquated locomotive of defendant set fire to the building; in other words, the evidence, taken as a whole, would warrant a jury in returning a verdict for the plaintiff. Of course, the weight to be given to the evidence was a question for the determination of the jury alone, and the question of fact should have been submitted to the jury under the instruction of the court.

Reversed and remanded.

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POSTAL TELEGRAPH CABLE CO. v. GREEN.

[83 South. 403, In Banc. No. 20923.]

TELEGRAPHS & TELEPHONES. *Punitive damages not allowed where the act is neither authorized or ratified.*

Neither under the rule of the federal court nor the rule in the state of Louisiana is the master liable in punitive damages because of a wrong committed by a servant, unless the master either authorized or ratified its commission.

APPEAL from the circuit court of Monroe county.

HON. C. P. LONG, Judge.

Suit by W. S. Green against the Postal Telegraph-Cable Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. N. Flowers and *Ellis B. Cooper,* for appellant.

McFarland & Holmes, for appellee.

SMITH, C. J., delivered the opinion of the court.

The appellee instituted this suit in the court below to recover from the appellant damages alleged to have been sustained by him because of the appellant's failure to comply with its agreement to transfer the sum of twenty-five dollars from Aberdeen, Miss., to him at Alexandria, La. The court below excluded the appellant's claim for actual damages from the jury, but did submit to the jury his claim for punitive damages, and there was a verdict and judgment in his favor therefor.

The contract for the transfer of the money to the appellee at Alexandria, La., was made for him at

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Aberdeen, Miss., by the Monroe County Cotton Oil Company, which delivered to the appellant at that place the sum of twenty-five dollars together with a written order, reading as follows:

"Aberdeen, Miss., Feb. 25, 1919. Postal Telegraph-Cable Co., Pay to W. S. Green, at European Hotel, Alexandria, La., twenty-five and no/100 dollars, subject to the terms and conditions named herein, which are agreed to. [Signed] Monroe County Cotton Oil Company, Aberdeen, Miss."

This order was duly transmitted by the appellant to its agent at Alexandria, La., but the agent failed to pay the money to the appellee, and it was afterwards refunded by the appellant to the Monroe County Cotton Oil Company.

The circumstances surrounding the failure of the appellant's agent to pay this money to the appellee, and on which the appellee's claim for punitive damages is based, in view of the disposition to be made by us of the cause, are not here material, it being only necessary to say that the acts of the appellant's agent complained of in this connection were neither authorized nor ratified by it.

The contract for the transfer of the money to the appellee being an interstate transaction, and the acts of the appellant's agent claimed by him to warrant the recovery of punitive damages having been committed in Louisiana, the appellee's right to such damages must be determined either by the rule relative thereto administered by the federal courts, or by the courts of Louisiana, but by which it is not necessary for us to determine, for the reason that in each jurisdiction the rule is that the master is not liable for punitive damages because of a wrong committed by his servant, unless he either authorized or ratified its commission. Consequently the court below erred in permitting the

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jury to render a verdict against the appellant for punitive damages.

Reversed and remanded.

INDIANOLA COTTON OIL CO. ET AL. v. CROWLEY.

[83 South. 409, In Banc. No. 20915.]

1. VENUE. *Defendant may not apply for change of venue after pleading general issue.*

Under the rules of pleading and practice a defendant who has filed the plea of general issue accepts the venue, and will not be allowed, especially after a year's time to withdraw the plea and make application for a change of venue which he has waived.

2. SAME.

There may be an exception to this rule, where the trial judge in his discretion should deem it manifestly just to allow such withdrawal and grant a change of venue.

3. VENUE. *Joint action may be brought where either defendant resides.*

Under Code 1906, section 707, as amended by Laws 1908, chapter 166, and Laws 1919, chapter 149, requiring civil actions to be brought in the court which the defendant or any of them may be found, but providing that a resident sued out of the county of his residence may have the venue changed, a joint action may be commenced in the county in which either of the defendants reside, and service on a defendant residing in another county is valid and binding.

4. TRIAL. *Defense of justification do s not entitle defendant to open and close.*

Where the defendant files a plea of justification to an action for assault, this does not entitle him to open and close the case, since in the absence of evidence, the jury must necessarily find for the defendant and plaintiff must prove an unjustifiable assault and his damages, and therefore has the affirmative.

5. MASTER AND SERVANT. *General manager acting within the scope of his employment in commiting an assault.*

Where the general manager of a plant told a bookkeeper to leave the books and accounts with him for inspection and when the

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bookkeeper hesitated to do so, assaulted him. In such case the general manager was acting within the scope of his employment and about his master's business and the master was liable for his acts, though he desired to inspect his individual account with the master.

APPEAL from the circuit court of Sunflower county. HON. H. H. ELMORE, Judge.

Suit by E. A. Crowley against the Indianola Cotton Oil Company and another. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, Moody & Williams, S. D. Neill, Capman & Johnson and *J. Holmes Baker*, for appellant.

Frank E. Everett and *S. F. Davis*, for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellee, E. A. Crowley, sued and recovered judgment against the appellants, J. H. Pettey and the Indianola Cotton Oil Company, for damages for an assault made upon appellee by Pettey, who was the general manager and agent of the oil company, from which this appeal was taken.

The record shows that the oil company was a domestic corporation, doing a general oilmill business at Indianola, Sunflower county, and was managed and controlled by the appellant Pettey, whose home and residence was in Leflore county. The suit was instituted in Sunflower county, and service of summons was had there upon both of the appellants. The appellants appeared and filed the general issue and special pleas to the declaration. After the cause had been pending about a year the appellant Pettey moved the court for

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permission to withdraw his plea of the general issue and for a change of venue to Leflore county where he resided. This motion was overruled by the court. The case then went to trial on the plea of the general issue by the oil company and special pleas of justification by both appellants.

The testimony in the record shows the assault occurred in the following manner. Mr. Crowley, the appellee, was the bookkeeper in charge of the books and accounts of the oil company. Mr. Pettey was the general manager, having full and absolute control over the operation of the oilmill plant, including full control over the bookkeeper, its books and accounts. On the day of the assault Mr. Pettey approached the appellee Crowley near the noon hour in the office of the oil company, and stated to him that he wanted to see the books of the company, and for him (Crowley) to go to dinner and leave the safe open and books out, so that he could inspect the books and the accounts. When Crowley hesitated in complying with this demand Pettey, as testified by Crowley, cursed and abused him, and assaulted him with a deadly weapon, striking him several times and leaving him in a bruised and dazed condition. It appears from the testimony of both Pettey and Crowley that Pettey desired to inspect the books and accounts of the oil company, and it was for that purpose that he ordered Crowley to leave the books out while he went to dinner. It is also developed in the testimony that Pettey especially desired to inspect his personal account with the oil company, kept in these books by Crowley. Pettey's defense at the trial was an effort to show justification for assaulting Crowley, but the jury, on the conflict of testimony, decided this issue of fact against him.

Reversal of the case is urged upon several grounds, which we shall now briefly consider. It is contended that the court erred in denying Pettey a change of

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venue to Leflore county, where he lived. We see no merit in this contention, for two reasons: In the first place, under the rules of pleading and practice a defendant who has filed the plea of general issue accepts the venue, and will not be allowed, especially after a year's time, as in this case, to withdraw the plea and make application for a change of venue, which he has waived. There may be an exception to this general rule, where the trial judge in his discretion should deem it manifestly just to allow such withdrawal and grant a change of venue. In the second place, section 707, Code of 1906, amended by chapter 166, Laws of 1908, and chapter 149, Laws of 1918, is so plain in its meaning and purpose that it needs no explanation for its proper application. In joint actions the suit may be commenced in the county in which any one of the defendants is domiciled or resides. The oil company, one of the joint defendants here, is a domestic corporation, and domiciled in Sunflower county, where this suit was instituted. Pettey, the other joint defendant, was served with summons to appear and defend the joint action where the corporation, one of the defendants, was domiciled. Certainly the service on Pettey, who was a resident of another county, was valid and binding, and required him to answer the suit in Sunflower county, the domicile of his codefendant, as provided by the statute.

Appellants contend that under the plea of justification by Pettey it was error in the lower court to refuse to permit appellant to open and close the case. We think this point is not well taken, because the burden of proof was upon the plaintiff to prove his cause of action and his damages. In the absence of evidence for either party the finding would necessarily have been adverse to the plaintiff. This being true, it was incumbent upon the plaintiff to prove his case of un-

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justifiable assault and the damages; and wherever the plaintiff is required to establish his claim or demand by evidence he has the affirmative, and is entitled to the opening and close of the case. Of course, if the plaintiff's right to recover completely all that he claims is admitted by the pleadings, and the question of avoidance is all that is involved, then the affirmative would be with the defendant, who would be entitled to the opening and close of the case. It is hardly necessary for us to say that the plaintiff was entitled to open and close this case in accordance with this rule.

The appellants further complain of the instructions granted the plaintiff in the lower court, and especially as to instruction No. 2. The basis of this general complaint as to the instructions is that the appellant Pettey was not acting within the scope of his employment and in furtherance of the master's business at the time he committed the assault upon the appellee Really this point goes more closely to the heart of the case as to the oil company than any other raised on this appeal. Considering all of the instructions together, we find no reversible error, unless it was error to instruct the jury on the theory that the oil company could be liable for the acts of the appellant Pettey. In other words, the contention that a peremptory instruction should have been granted for the oil company, as Pettey was acting beyond the scope of his employment and not about the master's business when he assaulted Crowley, would be well grounded if the testimony in this record did not show clearly that Pettey was acting within the scope of his employment and in furtherance of the master's business at the time of the assault, and that the assault was committed by Pettey while dealing with and carrying out the business of the master, the oil company.

The point urged is clearly untenable because the proof is that Pettey was the general manager of the

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oilmill plant and had control over all of its operations, employees, and property, including the bookkeeper and the books and accounts of the corporation. He went into the office and demanded of the bookkeeper that he be allowed to inspect the books and accounts of the corporation. He undoubtedly had the right and authority to demand, and make, this inspection, and the bookkeeper was in duty bound to comply with the request. Pettey demanded that the safe be left open and the books containing his account with the corporation be left with him for his inspection. The fact that it was the purpose of Pettey to examine his own individual account with the oilmill, as master, cannot relieve the master from liability for the act of its agent, Pettey, because he was acting about the master's business, that is, inspecting the books and accounts of the master; and this is true even though the particular account that he desired to inspect was his individual account with the master. If he was acting about his private individual account he was also acting with reference to the account of his master, and therefore was acting within the scope of his employment and about his master's business. He was undoubtedly acting for both himself and the master, and had full and complete authority to do so by virtue of his position as general manager, with full control over the thing about which he was acting. The testimony of Pettey himself with reference to his authority and action regarding the books and the bookkeeper in this case would have probably warranted a peremptory instruction for the plaintiff as to liability; but in any view it was sufficient to present the question of fact to the jury as to whether or not his acts were within the scope of his employment and in the furtherance of the master's business. *Barmore* v. *V. S. & P. R. R. Co.*, 85 Miss. 440, 38 So. 210, 70 L. R. A. 627, 3 Ann. Cas. 594; *Richberger* v. *Express Co.*, 73 Miss. 161,

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18 So. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522.

We find no merit in the contention with reference to the allowance of punitive damages in this case; nor do we consider that any substantial injury was suffered by the appellants with reference to the modification of one of the instructions granted the plaintiff below. The case warrants punitive damages, and the instruction referred to was sufficiently brought to the notice of counsel for appellants.

The judgment of the lower court is affirmed.

Affirmed.

STEVENS, J. (specially concurring).

It is expressly held in the opinion that: "Under the rules of pleading and practice a defendant who has filed the plea of general issue accepts the venue, and will not be allowed, especially after a year's time, as in this case, to withdraw the plea and make application for a change of venue, which he had waived."

The latter portion of section 707, Code of 1906 (section 486, Hemingway's Code), expressly provides: "If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, the venue shall be changed, on his application, to the county of his household and residence."

I do not think it necessary in this case to decide that a plea of general issue waives a right of a citizen resident to apply for a change of venue when he, as the sole defendant, has been sued in an action not local out of the county of his household and residence. There may be a difference between the technical plea to the jurisdiction which under well-known rules of pleading must be filed before a plea to the merits and an application under this statute for a mere change of venue. On this point I express no opinion. But Mr. Pettey was not the sole defendant in this action, and the court had

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jurisdiction by reason of the fact that one of the defendants was domiciled in and could lawfully be sued in Sunflower county. On this, the second reason given by the court for sustaining the jurisdiction of the trial court, and on all other points discussed in the opinion, I fully concur.

BRAHAN v. MERIDIAN LIGHT & RY. CO.

[83 South. 467, In Banc. No. 20836.]

1. HUSBAND AND WIFE. *Husband entitled to recover for loss of consortium of injured wife.*

   The husband may recover for such injuries as result in loss to him inflicted upon his wife even where the statutes allow the wife to recover for injuries to herself in her own name as our statute does.

2. SAME.

   The statute allowing a wife to sue for injuries in her own name was not intended to displace the husband as the head of the family nor affect his domestic rights, to the domestic services which the wife renders or would render but for her injuries, nor prevent him from recovering damages *per quod consortium amisit.*

3. NEGLIGENCE. *Comparative negligence statute applies to action by husband for wife's personal injuries.*

   Hemingway's Code, section 502, Laws 1910, chapter 135, providing that contributory negligence shall not bar but limit recovery, applies to a suit by a husband for injury to his wife; the term "personal injuries" in such statute being used merely to distinguish between injuries to person and injuries to property.

4. MUNICIPAL CORPORATIONS. *Not negligence to cross in middle of block.*

   Where there is no municipal ordinance prohibiting it, it is not negligent to cross a street in the middle of a block in the residence section of a city.

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APPEAL from the circuit court of Lauderdale county.

HON. R. W. HEIDELBERG, Judge.

Suit by F. V Brahan against the Meridian Light & Railway Company. From a judgment granting only a part of the relief demand, plaintiff appeals, and defendant cross-appeals.

The facts are fully stated in the opinion of the court.

Thomas G. Fewell and *F. Brahan,* for appellant.

Appellant's wife was painfully, seriously and permanently injured by falling upon defendant's Gas Pipe on Twenty-fifth Avenue in the city of Meridian. A former suit brought by Mrs. Brahan was before this court, decision "A," at a former term and was affirmed on direct and cross-appeal. The present suit was brought by the husband for expenses incurred and for damages.

"Per quod consortum amisit." At the conclusion of the evidence the trial court held that appellant could not recover for any damages except the expenses incurred, excluding any and other damages. The jury found a verdict for the appellant in the sum of two hundred and twenty-five dollars on which judgment was entered.

From the judgment and ruling of the court denying appellant the right to recover, other damages, this appeal is taken.

Argument. The only point now involved is whether or not the Mississippi constitution and laws emancipating married women abrogates the common-law right of action given a husband for injury of his wife. The trial court held that his rights were abrogated following

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the case of *Mari* v. *Stamford Street Ry, Co.* (Conn.), 33 L. R. A. (N. S.) 1042.

In presenting this purely legal question I ask the pardon of the court for quoting the note and authorities cited under the above case *in extenso.*

It strikes me that the note in question so fully answers and repudiates the doctrine of the Connecticut case of *Mari* v. *Stamford* upon which the learned trial court based its decision until nothing more may be said except perhaps to cite the later authorities.

It will be noted that this case followed the decision of *Feneff* v. *New York, etc., Co.,* 24 L. R. A. (N. S.) 1024, a Massachusetts case, in which the wife sued for injuries to her husband, and that is practically the only decision upon which the case of *Mari* v. *Stamford St. Ry.,* is based.

The Connecticut case stands with Massachusetts and Michigan with the great weight of authority to the contrary of their holdings. It is not disputed in the case at bar and it could not be a point of dispute, but that at common law the rights of action in the husband for injury to his wife is clear.

There, therefore, remains this only point. Does Mississippi, by its constitution provision and statute, abrogate or distroy the common-law rule?

"Right as affected by statute." Modern legislation which has so greatly affected the status of married women by recognizing their right to a separate existence, entitling them to the ownership of their property, giving them ability to contract, power to control their earnings, and endowing them with the capacity to sue or be sued has not according to the great weight of authority, although *Mari* v. *Stamford St. R. Co.,* is to the contrary, abridged in anywise the common-law right of a husband to the companionship, love, and service of his wife which is comprehended by the term

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"consortium" and its attendant right to sue therefor in the event of its loss through some personal injury to her.

Indeed it has been said the positive and explicit legislation is necessary in order to deprive the husband of his right to sue for the loss of the society of his wife. *Omaha & R. Valley R. Co.* v. *Chollette*, 41 Neb. 578. 59 N. W 921; *Mewhirter* v. *Hatten*, 42 Iowa, 288, 20 Am. Rep. 618.

In *Omaha & R. Valley R. Co.* v. *Chollette, supra*, where the husband brought an action to recover for the loss, among other items, of his wife's society, etc., through a personal injury to her, the trial judge restricted the jury to a consideration of the extent to which her injuries had incapacitated her from "performing" all the duties of a wife that reasonably devolved upon her in the marriage relation" and it was held that to this extent the husband could recover, notwithstanding the Married Women's Act.

As said in *Mewhirter* v. *Hatten, supra*, on a precisely similar question; "We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common-law and scriptural obligation and duty to be a "helpmeet" to her husband. If such a constitution were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic services or assistance rendered by her as wife. For her assistance in the care, nurture, and training of his children, she could bring her action for compensation. She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing. Certainly, such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation."

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Likewise, in *Birmingham Southern R. Co.* v. *Linteer*, 141 Ala. 420, 109 Am. St. Rep. 40, 38 So. 363, 3 A. & E. Ann. Cas, 461, where the statute provided "that the earnings of the wife are her separate property but she is not entitled to compensation for services rendered to or for the husband, or to or for the family," it was said: "While the scope or purpose of this enactment manifestly is to vest in the wife her earnings in services rendered to third persons, strangers to the household. It in no degree emancipates her from her household duties, nor authorizes her to enter upon such alien services as would conflict with and prevent the performance of her duties incident to the domestic establishment, the care, comfort and convenience of the family; the duties in short, which, before the statute, she owed to the husband as the husband and head of the family. These duties she owes now just as she did at the common law; and while the husband may allow her to pretermit them and engage wholly or to any less extent in outside services, the earnings of which belong to her, without such emancipation by the husband, she owes these services to him now as before, and for any wrongful act of a stranger which deprives him of them, he is entitled to recover for the consequent loss and injury."

Thus it has been specially held that the husband's right at common law to recover for loss of his right to the society of his wife is not affected by statutory provisions to the effect that a married man may receive, use, and possess her earnings and sue for the same in her own name, free from the interference of her husband or her creditors. *Blair* v. *Bloomington & N. R. Electric & Heating Co.*, 100 Ill. App. 400; *Chicago & M. Electric R. Co.* v. *Keempel*, 116 Ill App. 253.

That "the earnings of the wife are her own separate property; but she is not entitled to compensation for services rendered to or for her husband, or to or for

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the family." *Birmingham Southern R. Co.* v. *Crowder,* 135 Ala. 417, 33 So. 335.

That the earnings of any married woman from her trade, business, labor, or services shall be here sole and separate property, and may be used and invested by her in her own name." *Omaha & R. Valley R. Co.* v. *Chelete,* 41 Fed. 578, 59 N. W. 921; *Riley* v. *Lidtke,* 49 Neb, 139, 69 N. W. 356; *London* v. *Cunningham,* 1 Misc. 408, 20 N. Y. Supp. 882.

That the "wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right." *Mewhirter* v. *Hatten,* 42 Iowa, 388, 20 Am. Rep. 618; *McKinney* v. *Western State Co.,* 4 Iowa, 420.

That the wife is given the right to her earnings from future "separate labor." *Kirpatrick* v. *Metropolitan Street R. Co.,* 129 Mo. App. 524, 107 S. W. 1025; *Partello* v. *Missouri, P. R. Co.,* 141 Mo. App. 162, S. W. 473.

That "every married woman shall have the same right and remedies, and shall be subject to the same liabilities, in relation to property held by her in her own right, as if she were unmarried; and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried. *Booth* v. *Manchester Street R. Co.,* 73 N. H. 529,

That "neither husband nor wife has any interest in the property of the other" except "dower in real estate." *Baltimore & O. R. Co.* v. *Glenn,* 66 Ohio St. 395, 64 N. E. 438.

The established law in Pennsylvania, notwithstanding any statutory provisions entitling the wife to her earnings, or giving her control over her property, is to the effect that the husband is still entitled to compensation for the loss of her aid, assistance, comfort, and society, caused by negligence of others. *Reagan*

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v. *Harlan,* 24 Pa. Super. Ct. 27, citing *Plantz* v. *McKearn Twp.,* 178 Pa. 601, 36 Atl. 136; *Kelly* v. *Mayberry Twp.,* 154 Pa. 440, 26 Atl. 595; *Henry* v. *Koppfer,* 147 Pa. 178, 23 Atl. 337, 338, in which latter cases no reference was made to any statutes. And in *Hewit* v. *Pennsylvania R. Co.,* 228 Pa. 397, 77 Atl. 623, and *McMeekin* v. *Pittsburg R. Co.,* 229 Pa. 572, 79 Atl. 133, this right of the husband is held to be established without any mention of any statute.

So, in Massachusetts, although the husband's control over the person or property of his wife has been reduced to a minimum if it has not entirely disappeared (*Nolin* v. *Perason,* 191 Mass. 283, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 6658), he still retains the unmodified right to her conjugal society and may recover damages for injuries to her person through the wrongs of others. *Duffee* v. *Boston Elev. R. Co.,* 191 Mass. 563, 77 N. E. 1035; *Sullivan* v. *Lowell & D. Street R. Co.,* 162 Mass. 536, 39 N. E. 185; *Kelly* v. *New York, N. H. & H. R. Co,* 168 Mass. 308, 38 L. R. A. 631, 60 Am. St. Rep. 397, 43 N. E. 1063, wherein it said: notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which, by the common law, existed between husband and wife, have been impaired. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and obligations towards each other in sickness and health from that which other people have, or which she is at liberty to give them. By marriage, both husband and wife take upon themselves certain duties and obligations towards each other in sickness and health, which it cannot be supposed that the legislature had intended wholly to uproot. A married woman

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may now perform any labor or services on her sole and separate account as her husband may; nevertheless each owes certain duties to the other which are not annulled by the statutes. *Mewhirter* v. *Hatten,* 42 Iowa 288, 20 Ame. Rep. 618. These duties are included in the word "consortium."

Now, however, since the decision in *Bolger* v. *Boston Elev. R. Co.,* 205 Mass. 420, 91 N. E. 389, it may be seriously questioned whether the law upon this point in the commonwealth of Massachusetts remains as stated in the preceding cases. The case of *Bolger* v. *Boston Elev. R. Co., supra,* is not directly within the scope of the present note, since the action was brought by the husband to recover for the loss of his wife's consortium, etc., where death ensued, and belongs to the note to *Sherlag* v. *Kelly,* 19 L. R. A. (N. S.) 633. However, the court decided in that case that the husband could recover only for the expense he was put to in his endeavor to cure the wife and straightway followed *Feneff* v. *New York, C. & H. R. R. Co.,* 24 L. R. A. (N. S.) 1024, wherein it was held that a wife cannot recover for loss of consortium, against a stranger, for negligently injuring her husband physically and mentally, so that his companionship is less satisfactory and valuable than before the injury, where he has a right to recover full compensation in his own name. Nor did the court stop there. It went further, and said: "We do not see why the case of *Feneff* v. *New York G. & H. R., supra,* is not decisive of this case. No valid distinction can be drawn between the husband's right to recover for the loss of his wife's cosortium, in cases growing out of the negligence of a third party, and the wife's right to recover for loss of the husband's consortium in like cases; neither can it make any difference that, in the case of the wife, the loss of consortium is or may be the sole ground of recovery, and in the case of the

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husband it is or may be one of several grounds of recovery."

That the husband has a separate right of action to recover damages for the loss of services and consortium of his wife occasioned by her injury is the settled law of this and other jurisdictions. *Blair* v. *Bloomington & N. R. Electric & Heating Co.*, 103 Ill. App. 400.

Where the husband and wife join in an action to recover for personal injuries to the latter, it has been held that, under the Iowa statute (Rev. Stat. 1860, sec. 2771) the husband may join a claim in his own name and recover for the loss of his wife's society. *McDonald* v. *Chicago & N. W. R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114. This holding it will be observed, is contrary to the rule as established under the common law.

So, in *Casewell* v. *North Jersey Street R. Co.*, 69 N. J. L. 226, 54 Atl. 565, it was held that the husband and wife may sue together for personal injuries received by the latter, and in the action he may recover, among other items, compensation for the deprivation of the society of his wife.

To the cases referred to in the note just quoted should be added the recent case of: *Little Rock Gas. Co.* v. *Coppedge*, (Ark.), 1915, 172 S. W. 885, a very interesting and persuasive case, citing 23 Am. Cas. 1125 & note; Am, Cases 1912B, 1125.

The rule is stated fully in 13 Ruling Case Law. 1411, et seq; as follows: 462. Effect of Modern Statutes. —According to the great weight of authority statutes giving to a married woman the right to her earnings in her separate trade, or business or to use in her own name for personal injuries to her, do not deprive the husband of his right to recover for the loss resulting from her inability to render the ordinary household domectic services and his deprivation of her society

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and its comforts. The reason for this is that while such statutes may abridge a husband's right to compel his wife to work for him he still has a right to her society and assistance different in character and degree from that which other people have or which she is at liberty to give them and the husband may still recover compensation for the wrongful injury to such rights. So it has been held that the modern statute enlarging the property rights of a married woman and authorizing her to sue for injuries to her person and property do not prevent a husband from maintaining an action against a third person who trespasses on the home premises, though title thereto is in the wife and grossly insults her by attempting to seduce her and in such an action both actual and exemplary damages are recoverable by the husband. Citing: *Bame* v. *Clar* (N. C.), 19 L. R. A. (N. S.) 1033. The court will note that the only two cases cited under the above text as being *contra* are the Connecticut cases and a case from Michigan.

I earnestly submit to the court that the conclusion and rulings of the trial court are and were in conflict with the great weight of authority and cannot stand. Appellant therefore prays that inasmuch as three trials have resulted in verdicts necessarily carring the question of negligence that this court should reverse this case for assessment of damages to plaintiff *per quot consortium amisit* only.

Wilbourn & Baskin, for appellees.

Legal Point—Plaintiff not Entitled to Recover *for loss of service and association.* We submit that appellant is not entitled under the law to recover for any loss of service and any loss of association of his wife under the facts of this case, where she has survived her injuries and sued for and recovered in her name for all of them.

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Constitutional and Statutory Provisions of *Mississippi as to Married Women.* Under the constitution and statutes of Mississippi the husband and wife have now exactly the same status. Each is a separate entity. The wife can do anything with her property that the husband can do with his. Each has exactly the same vote on the conveyance of the homestead by the other. Sections 2159 and 2161, Code 1906. Each has the same homestead and personal exemption. Sections 2139, 2140, 3141, 2146, 2147, 2148, 2149, 2157, 2158, 2160, Code 1906.

Each may sue the other; Code 1906, section 2158. Dower and curtesy are both abolished, section 2519, Code 1906. The husband is liable to the wife for her income used by him; section 2520, Code 1906.

The same restrictions as to contracts between them apply to both; section 2521, Code 1906. The same restrictions as to conveyances between them apply to both; section 2522, Code 1906.

Section 2517, Code 1906, reads as follows: "Married women are fully emancipated from all disability on account of coverture; and the common law as to disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition or disposition of property of any sort, or as to her capacity to make contracts, and to do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and liabilities and incident thereto, as if she were not married."

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Section 94 of our constitution reads as follows: "The legislature shall never create by law any distinction between the rights of men and women to acquire, own, enjoy and dispose of property of all kinds, or their power to contract in reference thereto. Married women are hereby fully emancipated from all disability on account of coverture. But this shall not prevent the legislature from regulating contracts between husband and wife; nor shall the legislature be prevented from regulating the sale of homesteads."

No case involving the question involved here has ever been before the supreme court of Mississippi, so far as we can find. Indeed we can find no case in our reports involving a suit by a husband for a negligent injury to his wife not resulting fatally.

Authorities examined and cited. The case of *Mast* v. *Stamford*, 79 Atl. 582, 33 L. R. A. (N. S.) 1042, from the supreme court of Connecticut is directly in point, and we submit was correctly followed by the lower court. This opinion should be read in the light of and in connection with the case of *Feneff* v. *New York, C. & H. R. R. Co.*, 203 Mass. 278, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

In this latter case it was held the wife had no suit for loss of consortium where a husband was injured by no intentional wrong such as this. See, also, *Brown* v. *Kulleman*, 40 L. R. A. 236; also a case reported in 63 N. Y. S. 459.

Applying the reasoning of these cases to the facts of the case at bar, in the light of the present constitution and statutes of Mississippi, we submit that the husband and wife are under one law separate entities, and that each is exactly on the same basis, and that neither has any right that the other has not, and that if the wife may not recover against a third person, such damages for an injury of such nature to the husband, then the husband may not recover for such

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injuries to the wife. The husband is not more entitled to the wife's services than she is to his, that is, their rights are now mutual and exactly of the same nature. She can have a full recovery in her own case as could the husband in his. The reason for any rule giving the husband any right of recovery for services has passed away in Mississippi.

As to the effect of the statutes emancipating married women on the right of the huband to maintain a suit for loss of services and association, we submit that *Marri* v. *Stamford, supra,* deals with statutes like those of Mississippi, which make the wife a separate entity.

The supreme court of Massachusetts in the case of *Bolger* v. *Boston Elevated R. R. Co.,* 205 Mass. 420, 91 N. E. 389, followed *Feneff* v. *N. Y. C. & H. R. R. Co.,* 24 L. R. A. (N. S.) 1024, *supra,* saying: "We do not see why the cause of *Feneff* v. *N. Y. C. & H. R. Co., supra,* is not decisive of the case. No valid distinction can be drawn between the husband's right to recover for the loss of his wife's consortium in cases growing out of the negligence of a third party, and the wife's right to recover for loss of the husband's consortium in like cases. Neither can it make any difference that, in the case of the wife, the loss of consortium is or may be the sole ground of recovery, and in the case of husband it is or may be one of several grounds of recovery.

To the same effect is the later case of *Whitcomb* v. *Ry.,* 102 N. E. 663, the note of *Marri* v. *Stamford, supra,* which appellant's counsel cite, mentions numerous decisions under the statutes different from ours. We will endeavor to show that these decisions are under statutes unlike ours in that they do not entirely remove the disabilities of married women, as has been done in Mississippi. For instance, the Alabama statutes do not abolish either dower or curtesy, and do not

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remove entirely the disabilities of coverture. See Chapter 60, Code of Alabama 1896—sections 2520 to 2537.

With reference to the cases cited in the note relied on by counsel from the State of Illinois, beg to say that the Revised Statutes of Illinois 1906, chapter 69, deals with the subject of husband and wife. The statutes of Illinois do not appear to emancipate the wife as fully as she is emancipated in the state of Mississippi. In other words, Illinois statutes do not make the wife a separate entity to the same extent and as fully as the statutes of Mississippi, and it does not appear that dower and curtesy have been abolished in Illinois. See section 21, chapter 68, Code 1906 of Illinois.

Furthermore, there is a limitation upon the right of the wife to contract in Illinois to this effect that she may not carry on a partnership business without the consent of her husband.

The statutes of Iowa, section 2202 to 2219 on the subject of husband and wife are not as broad as the statute of Mississippi in emancipating the wife, as a mere comparison of the statutes will show.

As to the cases cited from the Missouri courts, we direct the court's attention to chapter 51 of the Revised Code of Missouri, 1906, beginning with sections 4327 to 4341. See especially section 4330, which gives a married woman the right to her separate earnings only in the event the husband fails to provide for her support.

See section 4333 with reference to the compensation for damages to married women's real estate, providing for investment thereof under order of court.

Section 4335 reads as follows: "A married woman shall be deemed a *femme sole* so far as to enable her to carry on and transact business of her own account. To contract and be contracted with, to sue and be sued,

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and to enforce and have enforced against her property such damages as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; providing a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family except in such cases where the husband has claimed such exemption and homestead rights, for the protection of his own property."

See, also, section 4339, which has been held not to deprive the husband of the right to the possession of his wife's realty nor to be restrained from reducing her personalty to possession. The statutes of Missouri clearly indicate that there has been only a partial emancipation of married women in that state.

Under the statutes of Pennsylvania, Act of June 3, 1887, women were given control over their property to only a limited extent. For instance, she has no power to convey or mortgage her real estate unless her husband joins in such mortgage or conveyance. She is prohibited from being an accommodation endorser or grantor for another.

We refer the court to the statutes in force in the other states from which decisions are cited in said note, without more particular discussion of them, except to submit generally that we believe the court will find that said statutes do not fully emancipate women as do the constitution and statutes of Mississippi.

We will list the case cited in the note and refer to the statutes under which it was decided, and in those cases where we have had opportunity to read the cases themselves, point out the distinguishing features of the cases. *Omaha & R. Valley Co.* v. *Chollette* (1886-1894), 59 N. W. 921; Nebraska, Statute Married Woman's Act; Neb. Comp. Stats. 1885. ch. 53, p. 423; ch. 72, pp. 464-5-6; ch. 53, p. 506. The wife is not fully

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emancipated and the precise question here involved was not considered by the court. *Blair* v. *Bloom & N. R. E. & H. Co.*, 130 Ill. App. —; *Chicago & M. Elec. Ry. Co.* v. *Krempel*, 116 Ill. App. 253; Illinois: *Blair case, supra,* defendant plead the former suit of the wife in bar and case turned on whether or not Statutes, ch. 68; Rev Statutes Illinois, 1906. In which the husband was precluded where wife had a separate calling, and did not involve the point in case at bar.

In the *Krempel case, supra,* 116 Ill. App. 253, there was a judgment by default and the effect of statutes was not considered. Missouri: *Kirkpatrick* v. *Met. Ry. Co.*, 107 S. W. 1025; January 8, 1904, to February 1, 1908, Rev. Stats. Mo. 1899, ch. 51; Anno. Stat. Mo. 1906, ch. 51.

The above case did not involve the point here considered. Iowa: *McKinney* v. *Western State Co.*, 4 Iowa, 420; Statutes, Code 1851, ch. 84, Title 17, pg. 218. In this case wife had to join husband in suit, and there was an arbitration and the case involved the award and the court simply said rule of common law not changed by statute. *Ohio*: *Blatamore & Ohio* v. *Glenn,* 64 N. E. 38, June 10, 1902. The opinion in above case shows clearly no such statutes as ours. Statutes, sections 3108 to 3117; 2 Bates Anno. Statutes. (4th Ed.), (1787-1904), pgs. 1776 to 1782 inclusive. Pennsylvania: *Henry* v. *Kloper,* 23 Atl. 337 (1890-1892); Statutes, 3 Purdon's Digest, (13th Ed.), (1700-1903), page 2446, section 34 to page 2463, section 71, inc. This case does not consider the point involved in the instant case. *Hewitt* v. *Penn. R. R. Co.*, 77 Atl. 623. (1910); Statutes, Purdon Sipp (1905-1915), page 6588, section 11 to page 6590, section 25, inclusive. This was a joint suit by husband and wife, where no question but extent of damages was involved, and no consideration of the point at issue here. *McMeeken* v. *Pittsburg R. R. Co.,* 79 Atl. 133 (1908-11), Statutes; same as above.

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This case is wholly inapplicable. It did not involve any question like the one in the case at bar. New Jersey: *Caswell* v. *North Jersey St. Ry. Co.*, 54 Atl. 565 (1901-3), Comp. Stats. N. H. (1709-1910), pages 3223 to 3238, inclusive. This case was a joint suit by husband and wife. There was no point as to right to recovery. Case simply turned on adequacy of verdict. Georgia: *Lewis* v. *Georgia*, 77 Ga. 576, (1886); Georgia Code 1882, articles 2 and 3, ch. 1, pages 402 to 414, inclusive; Sec. 11, page 1302, Const. Ga., Code 1882; *Georgia R. & Banking Co.* v. *Tice*, 52 S. E. 916 (1905); Georgia Laws 1865-66, title 26, Act 1866, page 226; Code 1882, Ga. sec. 3067; Georgia Code 1911, articles 2 and 3, pages 795-799, inclusive.

The question in the case at bar is not involved in the foregoing cases from Georgia. Illinois: *Chicago, B. & I. R. R. Co.* v. *Dunn*, 52 Ill. 260 (1867-9); Act 1861, page 143. This case simply involved question as to effect on wife's suit of a settlement made by husband after joint suit brought. Case discussed agency of husband. Indiana: *Citizens St. Ry. Co.* v. *Twinume*, 23 N. E. 159 (1890); 7 L. R. A. 352, ch. 71, pages 1106 to 1110, inclusive, Revised Statutes 1881. This case does not involve the point at issue. The husband's right in that case to recover was conceded. It was simply insisted that she could not recover for services which she gave him as a clerk. New York: *Tyler* v. *N. Y. Central R. R. Co.*, 48 N. Y. 47 (1872); Laws 1860, chapter 90; Laws 1862, chapter 172. This case has no application, we submit. Pennsylvania: *Standin* v. *Penn. R. R. Co.*, 63 Atl. 467 (1906); Act June 8, 1895, No. 284, pages 344-5; Act May 8, 1895, No. 35, pages 54-5; Act June 3, 1887, No. 224, pages 332-3.

This case was decided under an act that required a joint suit and under peculiar statutes, different from ours, and precise question in case at bar not discussed. North Carolina: *Brame* v. *Clark*, 19 L. R. A.

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(N. S.) 1033 (1907-08); Revisal of 1905 of No. Car. Vol. 1, ch. 51, pages 639 to 646, inclusive; Art. 10, section 6, Constitution Laws, N. C. Session 1891; See chapter 51, of Code of North Carolina.

These statutes are not like ours, and the case cited did not involve a suit for loss of services claimed to result from negligent injuries to the wife's person. By sections 2093 and 2094, the wife cannot convey property or contract without.

In the case of *Gas Company* v. *Coppage,* 172 S. W. 885, relied on by appellant, the question is not reasoned out by the court, and there is nothing to indicate such full emancipation of women as exists in Mississippi.

As to the citation from 13 R. C. L., section 462, title husband & wife, we submit that we have shown that numbers of cases cited in the note are not in point or inapplicable, or were decided under different statutes from those of Mississippi or the court had not reasoned out the question fully and carefully. In this connection, we call attention to 13 R. C. L., page 1414, title Husband and Wife, section 462.

Even where the husband is entitled to recover in action *per quod consortium amisit,* it is further held that he cannot recover for loss or impairment of his wife's society and companionship and solace; that there are sentimental intangible injuries which the law cannot measure, and injury to which is entirely too remote.

This is the rule in Mississippi in suit by father for the death of a child. *M. & O. R. R. Co.* v. *Watly,* 69 Miss. 145.

In *Hawkins* v. *Front Street Cable Co.,* 16 L. R. A. 808, where there was a joint suit and the law of community property prevailed, the court said: "In this case, the complaint seems to have been based upon the idea that he could also recover for the society, companionship, and solace of his wife, but we do not understand these to be recoverable injuries. As matter of

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fact, unless death ensues the husband is not deprived of either, although his enjoyment of them may be lessened by the knowledge of his wife's suffering. They are of those sentimental, intangible, injuries which the law cannot measure, even in case of death, they are not elements of damage. 2 Thomp. Neg., p. 1289; *Howard County Comrs.* v. *Legg*, 93 Ind. 523.

We submit that the lower court decided in accord with the better reasoned and true rule, and that this case should be affirmed on direct appeal.

ETHRIDGE, J., delivered the opinion of the court.

F. V. Brahan, the appellant, filed suit in the circuit court against the Meridian Light & Railway Company for damages to him resulting from a personal injury inflicted upon his wife caused by her falling upon an exposed pipe of the appellee alleged to be negligently put in and maintained at a street in the city of Meridian. The defendant pleaded the general issue and gave notice under the general issue that it would prove that the plaintiff was barred of recovery by the contributory negligence of appellant's wife. Mrs. Brahan, the wife of the appellant, has heretofore filed suit for personal injuries to herself against the appellee and the city of Meridian and recovered judgment on said suit, which case was affirmed by division A of this court in 78 So. 712. The proof showed that Mrs. Brahan, the wife of appellant, had crossed a street between her residence and that of a neighbor named Pappenheimer on some mission and started to return home and was walking down a terrace or descent between the sidewalk and the main portion of the street, and her foothold slipped and, falling, fell astride the gas pipe connecting the Pappenheimer residence with the gas main of the company, which said gas pipe was exposed and was so placed as to be several inches above

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the surface of the street level of the intersection of the street proper. The fall caused the fracture of bones, which occasioned Mrs. Brahan being confined in the hospital for some weeks and thereafter, in her home for some three or four months, it being necessary to have her attended by a nurse and treated by a physician, during which time she was unable to perform her household and domestic duties, and during which time it was necessary for Mr. Brahan to expend moneys. He brought this suit for the amount so expended and for damages *per quod consortium amisit.*

The trial judge excluded the evidence of damage for consortium and limited the plaintiff to the recovery of moneys actually expended, and this action of the trial court is assigned for error by the appellant. The appellee prosecutes a cross-appeal and assigns for error: First, that the court erred in overruling the motion by the cross-appellant at the conclusion of the testimony to exclude the evidence offered by the plaintiff, and direct the jury to return a verdict for the defendant; second, that the court erred in refusing to grant the cross-appellant a peremptory instruction asked by the cross-appellant and refused by the court; third, that the court erred in refusing to grant the cross-appellant the instructions asked by it and refused by the court as found on pages 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143 of the record. We will notice the assignment of errors by the appellant first.

The trial court's ruling in excluding from the jury the right to find damages for consortium and domestic services was predicated upon the theory that section 2051, Hemingway's Code, abolishing the disabilities of coverture, destroyed the plaintiff's right of action for consortium. This section reads as follows:

"Married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effect

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on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married."

In *Vernor* v. *Vernor*, 62 Miss. 260, which was a suit for alimony, Chief Judge CAMPBELL, speaking for this court, said: "Whatever the origin and foundation of the practice of the courts to make such allowance to the wife, it is not affected by the Code of 1880, which was not designed to supersede or abridge the equitable rights of married women, except as it may expressly provide."

It will be noted from the section above quoted that the wife is empowered by the section to acquire and dispose of property, to sue and be sued, and to make contracts, and do all acts in reference to property which she could lawfully do if she were not married, and to bind herself personally as if she were not married.

It is shown in proof in the case at bar that appellant's wife was at the time of the injury, and prior thereto, performing household and domestic services for her husband, and that her injury incapacitated her from performing those duties during several months, and plaintiff's proof tends to show that she was permanently injured.

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The appellee relies upon the case of *Marri* v. *Stamford St. Railroad Co.*, 84 Conn. 9, 78 Atl. 582, 33 L. R. A. (N. S.), 1042, Ann. Cas. 1912B, 1120, in which the supreme court of Connecticut, in construing the statute of that state similar to the one before us, held that a man cannot recover for the loss of the personal services of his wife, formerly embraced by the term "consortium," through injuries negligently inflicted upon her by another where the statutes have conferred upon her a legal entity of her own and relieved her of the obligation to perform services which she formerly owed to him. Appellee also relies upon the case of *Feneff* v. *N. Y. C. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S. 1042, 133 Am. St. Rep. 291, a Massachusetts case, in which the wife sued for injuries to her husband.

In a note to the case of *Marri* v. *Stamford St. R. R. Co.*, *supra*, the editor of this series collects the authorities, and at page 1046, 33 L. R. A. (N. S.), under heading, "Right as Affected by Statute," says:

"Modern legislation which has so greatly affected the *status* of married women by recognizing their right to a separate existence, entitling them to the ownership of their property, giving them ability to contract, power to control their earnings, and endowing them with the capacity to sue and be sued, has not, according to the great weight of authority, although *Marri* v. *Stamford St. R. R. Co.*, is to the contrary, abridged in any wise the common-law right of a husband to the companionship, love, and service of his wife which is comprehended by the term 'consortium,' and his attendant right to sue therefor in the event of its loss through some personal injury to her"—citing *Omaha & R. Valley R. Co.* v. *Chollette*, 41 Neb. 578, 59 N. W. 921; *Mewhirter* v. *Hatten*, 42 Iowa, 288, 20 Am. Rep., 618; *Birmingham Southern R. Co.* v. *Lintner*, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461;

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Blair v. *Bloomington & N. R. Electric & Heating Co.*, 130 Ill. App. 400; *Chicago & M. Electric Co.* v. *Krempel*, 116 Ill. App. 253; *Kirkpatrick* v. *Metropolitan Street R. Co.*, 129 Mo. App. 524, 107 S. W. 1025; *Partello* v. *Missouri P. R. Co.*, 141 Mo. App. 162, 107 S. W. 473; *Booth* v. *Manchester Street R. Co.*, 73 N. H. 529, 63 Atl. 578.

In the case of *Wyandotte* v. *Agan*, 37 Kan. 528, 15 Pac. 529, it was held that, under the provisions of the act respecting the rights of married women, the earnings of a married woman from her own business, and from her labor or services performed on her sole and separate account, belong exclusively to her, and an injury which prevents her from carrying on her separate business, or disables her from performing such labor or service, accrues to her alone, but that the services rendered by her in the household in discharging the ordinary duties of a wife belong to her husband and the loss of such services occasioned by an injury to her is his loss, and for which he only can recover.

In the case of *Brooks* v. *Schwerin*, 54 N. Y. 343, the New York court held that under chapter 90, Laws of 1860, concerning the rights and liabilities of husband and wife, as modified by chapter 172, Laws of 1862, which authorizes a married woman to perform any labor or service on her separate account, and gives her her earnings therefor, and empowers her to bring an action in her own name for injuries to her person, it was held that the services of a wife in her household still belong to her husband, and so far as an injury to her disables her from performing such services the loss is his, and he, not she, can recover therefor.

We think it is clear from the authorities that the husband may recover for such injuries as result in loss to him inflicted upon his wife even where the statutes allow the wife to recover for injuries to herself in her own name, as our statute does. Construing our

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statutes on husbands and wife as a whole, we are satisfied that the plaintiff was entitled to recover for consortium and that the court below erred in excluding from the jury this element of damages. We do not think the statute was intended to displace the husband as the head of the family, nor affect his rights to the domestic services which the wife renders, or would render but for her injuries.

We pass now to consideration of the assignment of error on cross-appeal. The cross-appellant contends that the contributory negligence statute (section 502, Hemingway's Code; chapter 135, Laws of 1910) does not apply to a suit by the husband for an injury to the wife, but only applies in case the wife is suing for her own injuries. Section 502, Hemingway's Code, reads as follows:

"In all actions hereafter brought for personal injuries or where such injuries have resulted in death, the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured."

It will be noted that the language here is very broad using the term "in all actions," etc., for personal injuries that the contributory negligence shall not bar recovery. We think the term "personal injuries" used in this statute cannot be so limited as to support cross-appellant's contention but that this word has a well-defined meaning which distinguishes these injuries from injuries to property.

The case of *Mulvey* v. *Boston*, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349, is in point here. The question there involved was where a statute of limitations for personal injuries barred a husband's right of action for injuries to the person of his wife was embraced in the statute. The court said:

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"The injury to the plaintiff's wife, on which his action is founded, was an injury to her person. The first question to be determined is whether the husband's action is for an injury to the person within the meaning of the statute. The language of the statute is not restricted to actions for injuries to the person of the plaintiff, and we think it is broad enough to include all actions of tort founded on injuries to the person of any one in such relations to the plaintiff that the injury causes him damage. There is nothing in the context to indicate that the words are used in a narrow sense, or that the actions referred to are only those brought by the person receiving the physical impact. The word 'for' is used in its ordinary signification of 'on account of,' 'because or by means of,' or 'growing out of' "—citing *Strong* v. *Sun Mutual Ins. Co.*, 31 N. Y. 103, 88 Am. Dec. 242; *State* v. *Cornell*, 54 Neb. 647, 655, 75 N. W. 25; *Maxson* v. *Delaware, etc., R. Co.*, 112 N. Y. 559, 20 N. E. 544; *Hutcherson* v. *Durden*, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811; *Bennett* v. *Bennett*, 116 N. Y. 584, 587, 23 N. E. 17, 6 L. R. A. 553; *Williams* v. *Williams*, 20 Colo. 51, 37 Pac. 614; *Wightman* v. *Devere*, 33 Wis. 570; *New* v. *Southern R. Co.*, 116 Ga. 147, 42 S. E. 391, 59 L. R. A. 115.

Many of the cases cited in the opinion quoted from are applicable here.

This court in the case of *Krebs* v. *Pascagoula St. Ry. & Power Co.*, 117 Miss. 771, 78 So. 753, holds the statute not applicable to injuries to property, and we think drew the distinction between injuries to the person and injuries to property.

The evident purpose of this statute was to impose liability on persons whose negligence caused an injury to a person, even though such person might also be guilty of negligence, for the purpose of compelling a high degree of care so as to protect life and limb, and we see no reason to give the statute an unduly narrow

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construction. We think the circuit judge ruled correctly on this point.

We do not think it was negligence for Mrs. Brahan to cross the street directly in front of her house instead of going to a street crossing and then going down the sidewalk on the other side. The street in question was in the residence section of the city, and there is no ordinance shown in the record requiring a person to cross the street at any particular point.

In 37 Cyc., pp. 13 and 14, it is said: "Ordinarily, however, the term" (highways) "is confined to public ways over land, and it is in this sense that it is employed in this article. Thus used it means a way open to all the people without distinction for passage and repassage at their pleasure."

At page 266, 37 Cyc., under heading "Right and Mode of Use—in General," it is said: "A public highway is open for use by the entire public, or any part thereof, simply for passage, in any reasonable manner, as to drive cattle, or for haulage, but not for sports or diversions. But even one using the highway unlawfully has rights against the negligence of others."

In *Brooks* v. *Schwerin*, 54 N. Y. 343, it is said: "Foot passengers and those driving in carriages have equal rights in the streets of a city, and both are required to exercise that degree of care and prudence which the circumstances of the case demand."

It was not negligence *per se* therefore for Mrs. Brahan to cross the street between street crossings. We think the evidence fails to show contributory negligence by Mrs. Brahan in the use of the street.

The assignments of error on cross-appeal in reference to instructions are not argued and, except as they fall within the points decided, not passed upon. The cause will therefore be reversed on direct appeal and affirmed on cross-appeal.

Reversed and remanded.

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Board of Highway Commissioners of Edinburg District v. Warren et al.

[83 South 479, In Banc. No. 2849.]

1. Highways. *Road district cannot incur debt unless authorized by electors.*

Under Laws 1918, chapter 209, section 2, forbidding incurring interest bearing debts unless so authorized a road district cannot issue bonds for improvement of roads unless authorized by a majority of the electors voting in an election called for that purpose.

2. A road district is a taxing district within the statute relating to incurring debts.

Under Laws 1918, chapter 209, section 2, prohibiting the incurring of interest bearing debts unless authorized by a vote of the majority of electors a road district is a taxing district.

Appeal from the chancery court of Leake county.

Hon. A. Y. Woodward, Chancellor.

Suit between the Board of Highway Commissioners of Edinburg road district and E. B. Warren and others. From a judgment for the latter, the former appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, for appellant.

The questions presented by the record in this case are important ones. The sole question is, as to the power of the chancellor in the hearing of objections to the validation proceedings under the Act of September 2, 1917, chapter 29. In other words, is a judgment of a board of supervisors of the same binding and conclusive effect in a validation proceeding under said act, as it, would be in any other proceeding, in which it might be attacked.

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Is the judgment of a board of supervisors in a matter over which it has jurisdiction subject to collateral attack, and to review by the chancellor in validation proceedings? Was it the purpose of the legislature to confer upon the chancellor, in validation proceedings, *quasi*-appellate jurisdiction, and the power to review and open up the judgment of a board of supervisors to the same extent that the same might be reviewed on appeal to the circuit court?

It is settled beyond any question in this court that the judgment of a board of supervisors in matters over which they have jurisdiction are conclusive and not subject to collateral attacks, that the remedy, if any, is by direct appeal to the circuit court as provided by the statute, and that remedy is exclusive, see: *Wolford* v. *Williams,* 110 Miss. 637; *Johnson* v. *Board of Supervisors,* 74 So. 321; *Hinton* v. *Perry County,* 84 Miss. 548. See, generally, *Dye* v. *Mayor,* 119 Miss. 359 (collateral attack).

It was settled by this court in the case of *Thomas* v. *Lee County,* 53 So. 585, 95 Miss. 232, and in the case of *Dean* v. *Desoto County,* 82 So., that the filing of the petition required by the statute, by the qualified electors for the establishment of a road district, and the issuance of bonds, conferred upon the board of supervisors jurisdiction of the matter.

In the case at bar, a petition signed by twenty per cent. of the qualified electors of the Edinburg road district was filed with the board of supervisors, under the provisions of chapter 176 of the Acts of 1914 asking for the establishment of the Edinburg road district and for the issuance of bonds.

The board of supervisors in pursuance with the requirements of the act caused notice to be published as required by law setting forth the purpose for which the bonds were to be issued, and describing the road district for which they were to be issued and its purpose to

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issue bonds on a certain day therein named, unless a counter petition, as required by law, was filed, within the three weeks next preceding the day fixed by the notices on the board would be authorized to act.

It appears that a counter petition was filed, or what is purported to be a counter petition but upon canvassing the petition is was found to be irregular and illegal in several respects, in addition to its not being filed in time, and the board of supervisors proposed to reject petition, but entered an order allowing the petition to to be withdrawn and giving the counter petitioners thirty days within which to file a proper petition. See page 27 of the record. The record, however, recites that after this order was made, the board of supervisors were advised that they had no authority to extend the time for filing the counter petition, no legal petition being on file at the time required by law. See page 36 of the record, and the board then proceeded to order an issuance of bonds in the sum of twenty thousand dollars, as recommended by the road commissioners, and the said bonds were issued and advertised for sale and bid in by the Merchant's Bank & Trust Company of Jackson, Mississippi. It does not appear, however, that the bonds have been delivered. The proceedings in reference to the issuance of the bonds were instituted in April, 1917, an order authorizing the bonds was made in July, 1917, and the bonds were offered for sale and bid in, as above stated, on December 3, 1917.

Validation proceedings were instituted under the provisions of the Act of 1917, the matter having been submitted for validation to Mr. Thomas M. Owen, who was then state's bond attorney, who rendered an opinion May 15, 1918, that the bonds were legal, valid and binding. See pages 12 and 13 of the record.

The matter was set for hearing before the chancellor for June 28, 1918, and on that day three taxpayers filed objections to the bonds in general terms. See page 3 of

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the record. Mr. Owen, state's bonds attorney, made a motion to strike out these objections from the file, upon the ground set forth in a motion which appears on page 4 of the transcript. The objectors afterwards on July 11, 1918, filed specific objections, see pages 5 to 9 of the record, at which time the chancellor proceeded to hear their objections and take testimony.

The court will see from the reading, the objections, and the testimony, that the whole contention was an attack upon the judgment rendered by the board of supervisors; that it erred in its judgment as to its power to extend the time for the filing of a counter petition. There is nothing else in the controversy. There is a charge of fraud in the objections, but this is general and not sustained by the record.

I insist that whether the board of supervisors were right or wrong in its conclusion, the matter could not be inquired into in the validation proceedings, that the remedy for the objectors was by an appeal to the circuit court, and that was the exclusive remedy. The transcript shows, page 49 of the record, that no appeal was taken from the judgment of the board of supervisors establishing a road district and authorizing the issuance of bonds, and that no suit or action of any kind is pending against the establishment of the road district or the issuance of the bonds, and that no action or suit was threatened.

The only clause in the Act of 1917 in reference to the functions of the chancellor is contained in the next to the last paragraph of section 2 and is in these words: "And on the hearing, the chancellor may hear additional evidence and inquire into the validity of the bonds proposed to be issued and enter a decree in accordance with his findings." This language is somewhat vague, and the question now is, is that board enough and sufficiently clear as to confer upon the chancellor the power to open up the whole pro-

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ceeding and set aside the judgment of the board of supervisors, if in his opinion he should believe that the board of supervisors erred in the conclusion which they have reached, the question not being a jurisdictional one or one of fraud or of any excess of power in violation of any positive statute.

In other words, does the language, hear additional evidence and inquire into the validity of the bonds to be issued," carry with it, or embrace and confer upon the chancellor the power to set aside the judgment of the board of supervisors, otherwise conclusive and not subject to collateral attack, and try the whole question *de novo*. Have judgments of boards of supervisors no conclusive effect in validating proceedings under the Act of 1917? The circuit court has jurisdiction on appeal to try a matter arising before the board of supervisors *de novo* and enter such judgment as the board of supervisors should have entered. I submit that the language quoted from the Acts of 1917, falls very far short of conferring any such power upon the chancellor. There are many matters affecting the validity of bond issues which could be dealt with by the chancellor which could not be cured by any judgment of the board of supervisors, as for instance questions going to the jurisdiction. If proceeding under the Acts of 1914, chapter 176, the board of supervisors should have undertaken to issue the bonds without a petition on the part of the electors, this would be a jurisdictional matter which the chancellor could consider. If the notice required by the statute was not given and these matters appear upon the record, as they must affirmatively appear, the matter could be considered by the chancellor. If the maturity of the bonds was not as prescribed by the act, it is a matter which could be passed upon by the chancellor because these being positive statutory requirements, not confided in any way to the judgment or discretion of

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the board are all matters which could be inquired into by the chancellor. If in case of an election there was actual fraud vitiating the election, or the record shows that no election was held where an election is required, these matters being positive statutory requirements could not be dispensed with by the board of supervisors, and any issue of bonds in violation thereof would be invalid. This matter, however, of the sufficiency of the petition and counter petition is a matter for the board of supervisors to determine, and as to those matters its judgment is conclusive and can only be inquired into by direct appeal to the circuit court and would not be subject to collateral attack.

At all events it is highly important that the court should pass upon these questions and determine now whether the power has been conferred upon the chancellor to revise a judgment of a board of supervisors, in matters within its jurisdiction, however erroneous that judgment may be.

It seems to be settled that statutes like the one in question conferring special powers upon a court must be strictly construed and nothing is to be presumed that is not expressly given. The rule is thus laid down in 2 Lewis' Sutherland Statutory Construction, section 564: "Where special powers are conferred upon a court either of otherwise, general or limited jurisdiction it is rigorously restricted to those granted, and the grant itself is strictly construed; the jurisdictional facts must appear on the face of the proceedings. The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed that is not expressly given."

I think, therefore, it could not be presumed that the legislature intended to confer upon the chancellor the power to review the judgment of boards of supervisors, in matters within their jurisdiction or power to hear

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or determine matters *de novo* or to exercise powers of appellate court. The power of the chancellor, I take it, is to examine the transcript of the record presented, which of course must show affirmatively all of the jurisdictional facts and also it must appear that the provisions of no positive statutory requirements as to which the board of supervisors had no sort of discretion or power to adjudicate has been violated.

We have cited cases above in which this court has held that the judgment of boards of supervisors in matters within their jurisdiction have all the force and effect of judgments of courts of general jurisdiction and can only be attacked upon same ground and for the same reasons such judgments could be attacked.

No one could be hurt by the adoption of the view which I am here advancing, for the reason that the remedy by appeal is speedy, adequate and complete.

It is suggested by counsel for the appellee that the institution of validation proceedings confer jurisdiction upon the chancery court to open up the whole subject. Would the court hold that if the board of supervisors should enter an order referring the matter to the state's bond attorneys for validation before the time for taking an appeal from its order authorizing the issuance of bonds had expired would cut off a right of appeal to the circuit court as provided by the statute? Manifestly not. It is also quite manifest that an appeal to the circuit court taken properly would have the effect of cutting off validation proceedings until the matters had been settled in the circuit court or at least on appeal. Jurisdiction to try the matter *de novo* has been conferred upon the circuit court, no such jurisdiction is conferred upon the chancery court, as we have shown above. Doubtless such jurisdiction might be conferred upon the chancery court, but it would have to be done by some express and clear statutory provision.

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As I understand it, the Act of 1917 was intended to afford a speedy procedure for the validation of bonds, which would cut off the flood of litigation which has heretofore arisen in attacks upon bonds of various kinds involving expensive protracted litigation.

Another question presented by the record is this: the bonds in this case were authorized prior to the passage of the Act of 1918, chapter 209. No election was held. The whole matter had been consummated except the actual delivery of the bonds, the bonds were offered for sale and bid in by a proposed purchaser. That was done December 13, 1917, and the offer was accepted by the board The only thing in the way of delivery of the bonds was the condition that the bonds should be approved by Mr. J. C. Thompson, a foreign bond attorney. It does not appear from the transcript what action Mr. Thompson took in reference to the bonds, or whether they were actually submitted to him for approval. In this state of case, the bonds not having been actually delivered, is it necessary that an election be held under the provisions of section 3 of the Acts of 1918, chapter 209?

In the case of *Board of Supervisors of Madison County* v. *Howard,* 80 So. 524, the point was made that the Act of 1918 did not apply to cases where the road district had been established and was in the course of construction at the time of the passage of the act. The court, however, without passing upon that question specifically in effect decided that the Act of 1918 did apply. The facts in that case, however, are different from the facts in the case at bar as the court will readily see. The entire issue of bonds authorized in the first instance have been exhausted, and the amount of bonds issued in the first instance was up to the limit allowed by law based upon the assessment of the property in the district at that time. The bonds in question were an additional issue necessary to complete the work

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and were based on an increased valuation of the property in the district at the time the subsequent issue was made.

The case at bar is entirely different, the bonds have been authorized, they are within the legal limit and it is not a quesion of additional bond issue, and everything had been consummated prior to the passage of the Act of 1918 except the delivery of the bonds. I take it that in a proceeding under the Act of 1914 an issue of one hundred and fifty thousand dollars of bonds were authorized and the board of supervisors proceeded under the authority of the Act, section 2 had issued and sold one hundred thousand dollars of the bonds, the court would not say that they could not issue and sell the remaining fifty thousand dollars, without an election after the passage of the Act of 1918.

Another question is presented and that is this: Should the motion of the bond attorney to strike out the original objections have been sustained? In other words, is it sufficient to meet the requirements of the act that the mere general objections should be filed without stating any ground for the objection? Is it not necessary for the objector to file specific objections within the time fixed by the statute for filing objections. The specific objections were not filed until thirty days after the date fixed by the chancellor for filing objections.

I respectfully request the court to pass upon all of the questions involved, as they are important, and this is the first time the Act of 1917 has come before the court for construction or interpretation.

J. L. McMillen, for appellant.

There is no question at issue as to the rights of requiring an election on question of bond issue except within the bounds of the statute. There is no law board, in ordering the issuance of these bonds, stayed

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that provided by statute, and when objectors have failed to avail themselves of the rights there given them, they can't be heard to complain.

We might eliminate the fact that objectors did not comply with the law requiring them to file a petition signed by twenty per centum of the qualified electors of the district within "three weeks next preceding" the first Monday in May, 1917, and still the proceeding of the board in ordering the issuance of these bonds is valid and binding. On May 7th, the day fixed for the issuance of the bonds, the board took up the petition of objectors and by order entered on its minutes of that day, after examining and carefully considering the petition, found that the same "was irregular as to the signatures thereto, and the same did not conform to the law." These were questions on which the board had full jurisdiction to pass, and having adjudicated them, their action was final, except on appeal to the circuit court. In the case of *Thomas* v. *Board of Supervisors,* 53 S. 585, the court said: "The petition conferred jurisdiction on the board to act in accordance with the powers conferred by the act. After the petition was filed and the notice was published of intention to issue the bonds, all persons in the district were parties to the proceeding and are concluded by the proceedings of the board to which they did not object, at a public meeting and without objection from any one, the board abandoned the extention feature of the petition" etc.

The chancery court is as firmly bound by the record in this case as in an injunction proceeding against the issuance of bonds or against the collection of taxes to pay off bonds illegally issued, and all questions of fraud having been fully eliminated by the testimony heard before the chancellor the validity of these bonds rests on the record of the board of supervisors, the record passed on by the state bond attorney. In the case of *Johnson* v. *Board of Supervisors,* 74 So. 321,

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in the opinion on suggestion of error, the court said: "In this case the appellants contend that the court erred in holding that the chancellor found against them on the facts, stating that the chancellor refused to give them a finding on the facts. While no special finding was put in the records, the judgment rendered had the effect of finding against the appellant on the facts. The order of the board of supervisors shows the jurisdictional facts on its face expressly reciting that twenty per cent. of the qualified electors had petitioned for the board to adopt the law. This being true, its judgment had all the effect of a valid judgment of a court of general jurisdiction, and can only be questioned by a direct proceeding by appeal or *certiorari*. The circuit court has supervisory jurisdiction of all inferior tribunals, and the chancery court has no such jurisdiction, and when the records show jurisdiction in the board to pass the order, chancery cannot question the validity of the proceedings. In the case of *Hinton* v. *Perry County*, 84 Miss. at page 546, 36 So. at page 567, this court said: Actions of the board not involving jurisdictional power are conclusively right in this collateral litigation. Its jurisdiction being, in this matter, limited, the minutes must show that the jurisdictional facts were found to exist. This being done, there is no need ever to set forth the evidence in the judgment and it is not controvertible, except on direct appeal.

In that case the board was exercising a statutory power, while in this case it was vested by the constitution with full jurisdiction. See also, *Wolford* v. *Williams*, 110 Miss. 637, 70 So. 823, where this court held that an appeal from the board was the exclusive remedy.

At the regular June, 1917, meeting, on the 6th day of that month, the board of supervisors, among other things found as follows: "Whereas, said board of supervisors found at their May, 1917, meeting, that

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certain qualified electors of said road district had filed a petition against the issuance of the road bonds of said district on May 7, 1917, and that said petition was irregular as to the manner of the signatures thereto and that the same did not conform to the law, and, Whereas, the said petitioners who had joined in said illegal and insufficient petition thereupon asked permission to withdraw their petition filed against the issuance of the bonds of said road district and to be allowed time in which to circulate a petition conforming to the law in such cases, which request was by the said board of supervisors granted and the petition accordingly withdrawn from the files by those interested therein and, Whereas, a petition was filed by certain citizens of said road district, on June 4, 1917, protesting against the issuance of the bonds of said road district, and this cause came on for hearing before the board of supervisors at this regular June, 1917, meeting and the board after hearing the petitions and proof adduced before them in open court found as follows: that the original petition praying for the establishment of said Edinburg Road District of Leake County, Mississippi, and the issuance of bonds thereon was made and filed in due and legal form; that the order ordering that notice of publication he made of the purpose of the board to issue the bonds of said road district at the regular May, 1917, meeting thereof was duly and legally made and entered on the minutes; that the publication of notice of their purposes to issue the bonds of said road district at said May, 1917, meeting was duly and legally made; that no legal petition was filed against the issuance of the bonds of said road district within the time allowed by law, and that the board was without authority of law to grant an extention of time within which to file such opposing petition, and that upon the present hearing there is no petition legally o nfile against the issuance of the

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road bonds of the said Edinburg Road District of Leake County, Mississippi.

Now, therefore, be it resolved and ordered by the board that Edinburg Road District of Leake County, Mississippi, formed and organized, created and bounded as aforesaid be and the same is hereby found and declared to be fully and legally under the operation of the provisions of chapter 176 of the Laws of 1917.

And it is further resolved and ordered that the road bonds of said Edinburg Road District of Leake County, Mississippi, be issued in an amount or amounts not to exceed ten per cent. of the assessed value of all taxable property of said road district, as provided by chapter 176 of the Laws of 1914, for the purpose of constructing one or more public highways in said road district.

J. W. Wadsworth and *Monroe McClurg*, for appellees.

The first insistence of counsel for the appellant is that no petition by twenty per centum of the qualified electors of the proposed road district was filed against the issuance of the bonds within three weeks next preceding the meeting of the board of supervisors on the first Monday, the 7th day of May, 1917; that the district having been established at the previous April meeting the burden was then on the objectors to comply strictly with the law informing, signing and filing their petition; that it was necessary that they should have alleged all jurisdictional facts in their opposing petition, and that they should have appeared before the board and made proof of the facts alleged.

Counsel's statement is erroneous in each detail. The proceeding is purely statutory, and the Act of 1914 does not require the petition to be in writing, except inferentially, nor to be signed or filed, nor to state any jurisdictional fact. All of that was required of the original petition for the bonds and that petition gave

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the board of supervisors jurisdiction of the whole matter. The opposing petitioners had only to state substantially that they were against the issuance of the bonds. That the opposing petition represented twenty per centum of the qualified electors of the district might have been properly alleged in a written petition, but that was a mere matter of proof and not jurisdictional in any sense.

The petition of the objectors which appellant's counsel states was in fact filed by the clerk of the board on the 7th day of May, contained the names of eighty-two out of the one hundred and fifty-eight qualified electors in the district. There were two petitions, one the copy of the other, circulated and signed. Mr. E. B. Warren had one signed by forty-four names but thinking that all of the names should appear on the same petition, he had his daughter to transfer those forty-four names to the other petition in the hands of Mr. Blocker which had thirty-eight names on it. It was found that of the forty-four names on Mr. Warren's petition only thirty-eight were genuine, and of those of Mr. Blocker's petition twenty-seven were genuine making sixty-five genuine subscribers of the one hundred and fifty-six legally qualified electors in the district, or over forty per centum thereof. The mere mistake in transferring the forty-four names to the other petition with thirty-eight on it, could have been and unquestionably would have been corrected, because Mr. Warren said that he had left it at home after the transfer. He would have gotten it but at this juncture Mr. Walker, the board's adviser, not being mindful or advertent at that moment to the requirement of the statute that the objecting petition should be gotten up within the three weeks, during the publication of the original petition for the issuance of the bonds, and in the fear that the irregularity of the signatures might affect the sale of the bonds, and in the hope that time might quiet an increasing

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objection to the issue of the bonds, voluntarily and in patronizing spirit, suggested first to the board that they give the objectors thirty days in which to get up another petition he thought then that the board had authority to do it the board accepted the suggestion and he wrote the order that was entered on the minutes. That order provided that "at the resuest of the objectors they were allowed to withdraw their petition for he believed that they would need it in getting up the new one." The truth was, he says, the objectors did not request to be allowed to withdraw it, but the clerk had that written in the minutes for his authority to let them withdraw the paper.

So then when the searchlight let in on the shadows of the chasm by the chancellor's wise decision to have additional evidence, it is easy to read that on Monday, the 7th day of May, 1917, at the June meeting, the petitioners "against the issuance of the bonds, in truth and in fact, had on file a written petition signed by largely more than twenty per centum of the qualified electors of the Edinburg Road District" plainly expressing themselves as being against it, and that was all that was necessary.

The third assignment of error is that the chancellor held that the board of supervisors had power to extend the time for allowing the objectors to file their petition after the expiration of the "three weeks" during the publication of the original petition for the bonds. The chancellor did not so hold; there is nothing in the record, or the decree, from which an isference that he did so hold may be reasonably drawn.

As we understand the statute on the "within that time" or during the "three weeks" publication of the petition for the bonds, it is substantive law requiring the opposing petition. Inferentially only, a written and signed petition, which might be properly filed with the clerk of the board "within that time" if re-

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quired, but after the positive statement that the opposing petition shall be had, the form of it, the manner of signing and the time of filing are not required at all. Not even in directory words. It must be the law, especially equity law, that when the petition in the instant case was filed on May 7th, the first day of the meeting of the board, with sufficient substance to indicate that the petitions were "against the issuance of the bonds," every presumption that it was gotten up within that time and all other presumptions as to its sufficiency, were in favor of its validity. While the record shows that it was only irregular, and did not conform to law, the argument of counsel in his brief discloses the fact that the board was erroneously made to believe that this opposing petition had to contain all jurisdictional facts in strictly formal way, and that the burden of so proving it was upon the objectors. In short, a perfectly legal petition against the bonds signed by over forty per centum of the qualified electors of the district was murdered. Not however, beyond the resurrecting power of the chancery court. That the "within that time" is purely directory and means for a petition to be presented at the first meeting of the board after the begining of the publication of the petition for the bonds is evident, is shown, by the obvious appearance that "within that time" was a second thought and interpolated into the original draft of the law, and because there was no meeting of the board to hear petition. The greatest liberality is allowed with reference to formal requirements in such case before such bodies.

As was held by Mr. Chief Justice MAYES, on a similar contention in *Western* v. *Hancock County,* 98 Miss. 800, 809-811. If the petition was presented and filed at the first meeting of the board, it was sufficient.

The proceedings before the board of supervisors having been, at its special request, certified to the chancery

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court, a new and largely an original jurisdiction, it fell under the judgment of one of the ablest and most conscientious chancellors in the state. The statute, section 2, chapter 28, Laws 1917, page 19 provides: "If at the hearing of any tax-payer of the county, municipality or district appears and objects to the issuance of said bonds, then the chancellor may hear additional evidence and inquire into the validity of the bonds proposed to be issued and enter a decree in accordance with his finding."

The chancellor wisely decided to hear additional evidence and inquire into the matter, and doing so, found that "on the law and the facts in the case, the issuance of the bonds was illegal and void."

We respectfully submit that the decree should be affirmed.

Sykes, J., delivered the opinion of the court.

This litigation arises out of the attempted organization of a road district to be called the Edinburg Road District in Leak County, under chapter 176 of the Laws of 1914. It is unnecessary to recite the various steps taken and the orders of the board of supervisors relating thereto. The last order of the board entered at its June Meeting, 1917, authorized the issuance of twenty thousand dollars worth of bonds. A conditional bid for these bonds was made by a bank of Jackson, Miss., conditioned upon the approval of the bonds by some expert bond attorney of New York. The record does not show the approval of this attorney. The bonds were never issued and delivered.

Under the provisions of chapter 28, Laws of 1917, the board of supervisors, under section 2 of this act, by order entered on its minutes, transmitted to the bond attorney a certified copy of all papers pertaining to the issuance of these proposed bonds. The bond

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attorney, Hon. Thomas M. Owen, now deceased, held the proposed issue valid. The case was then docketed in the chancery court under this section of the act, and upon final hearing the learned chancellor held the proposed bond issue to be void. From which decree this appeal is prosecuted.

A very interesting question is presented by the bond attorney who appears for the appellants in this case. It is his contention that, under chapter 28, Laws of 1917, section 2 thereof, providing for the inquiry by the chancery court into the validity of the issuance of the proposed bonds, this is a proceeding in the nature of a collateral proceeding or attack upon the judgment of the board of supervisors. It is contended by the attorneys for the appellees that under this act the chancellor is given the power to consider the regularity of the proceedings before the board of supervisors, that it is a direct and not a collateral proceeding. It is not, however, necessary for us to decide this question in this case.

If every order entered by the board of supervisors in the proposed organization of this road district were valid, these bonds could not be issued because not authorized by a majority of the electors voting in an election called for that purpose, as is provided in section 2, chapter 209, Laws of 1918. Under this section no interest-bearing debt except as provided in section 1 of the act (which would not include this bond issue) shall be incurred by any county or taxing district unless authorized by a majority of the electors who shall vote in an election called for that purpose.

There were no outstanding obligations or indebtedness incurred in this case, and there could not be any until the bonds were actually sold and delivered. In the case of *Madison County* v. *Howard,* 119 Miss. 133, 80 So. 524, which was also a proceeding to organize a road district under chapter 176, Laws of 1914, the same chapter

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under which this district is proposed to be organized, the court held a road district of this kind is a taxing district as contemplated by section 2 of the this act. This act was also construed in the case of *Heidelberg* v. *Batson, Mayor, et al.*, 119 Miss. 510, 81 So. 225. The court through HOLDEN, Justice, in part said:

"It was the further purpose of the act, under section 2 thereof, to prohibit any county, municipality, or taxing district from incurring any interest-bearing debts whatsoever, be it outstanding warrants, bonds, or any other form or character of interest-bearing debt, unless such interest-bearing debt be first authorized by a majority of the electors who shall vote in an election to be called for that purpose."

It was further held in that opinion that this act was constitutional.

The decree of the lower court is affirmed.

Affirmed.

EX PARTE MOODY.

[83 South. 529, In Banc. No. 21060.]

1. CRIMINAL LAW. *Duplicate detention warrant sufficient for detention of convict.*

Under Hemingway's Code, sections 4015, 4016, 4025, Laws 1908, chapter 109, relating to detention of convicts, a duplicate detention warrant issued by the sheriff to a county convict manager after the original detention warrant has been sent out, of the state at the time the convict escaped and was not returned, was sufficient authority for the convict's detention, where the duplicate was an exact copy of the original.

2. SAME.

If a detention warrant is lost or accidentally destroyed, a duplicate can be issued.

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3. CRIMINAL LAW. *The period while a convict is at large will not be included in calculating the expiration of his sentence.*

Even though two years be the limit for which a convict may be held, he is not entitled to have the time which elapsed during his period of escape counted in the making of a two year period.

APPEAL from he circuit court of Perry County.

HON. R. S. HALL, Judge.

Habeas corpus proceedings by Frank Moody. From a judgment denying the writ, the petitioner appeals. The facts are fully stated in the opinion of the court.

D. K. McDonald, for appellant.

Ross A. Collins, Attorney-General, for the state.

ETHRIDGE, J., delivered the opinion of the court.

Frank Moody, appellant, filed a petition for writ of *habeas corpus,* alleging that he is unlawfully deprived of his liberty by the convict manager of Perry county, and that he had demanded of the said convict manager in person and by attorney his authority for detaining petitioner, and that the said convict manager had failed and refused the same. The convict manager answered that he held the said Frank Moody by virtue of his detention warrant issued upon a conviction upon a plea of guilty on which the said Frank Moody was sentenced to pay the sum of one hundred dollars and serve five months in jail; that said detention warrant was issued the 13th day of April, 1913; and that said Frank Moody escaped on the 13th day of August, 1915, and was captured within the said county after the Governor had issued a requisition on the Governor of Louisiana, which requisition was duly honored, and Frank Moody was placed back in prison on the 28th day of October, 1919. A petition for *habeas corpus* was sworn to on the 12th day of November, 1919. A

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detention warrant made exhibit to the answer of the convict manager, omitting the formal parts, reads as follows:

"You are hereby authorized to detain Frank Moody in your custody until the 22d day of July, 1917, at 12 o'clock m., unless he pay out before that time, he having been on the 8th day of April, 1915, convicted of petit larceny by circuit court of said county, and sentenced to pay a fine of one hundred dollars, costs seventy three dollars and eighty-five cents, and to serve one hundred and fifty days in jail."

The warrant was dated the 10th day of April, 1915. The convict was receipted for on the same day. The detention warrant issued to the convict manager was sent to the Governor to be used with the requisition, and it was sent to Louisiana and was not returned, and the sheriff, on the recapture of Moody, issued an exact copy of the original detention warrant and turned it over to the convict manager, and he was held under such duplicate, or copy, of the original detention warrant. The sheriff testified that it was an exact copy of the original. It further appears that the convict manager had been changed in said county during the period of escape, and that the present convict manager at the time of the escape was a guard.

It is contended that the duplicate or copy of the detention warrant is not sufficient to meet the requirements of law, and, second, that the warrant issued was void because it authorized the detention of the convict for a longer period than two years.

Section 4015, Hemingway's Code, Chapter 109, Laws 1908, provides:

"If a convict be sentenced to imprisonment to the county jail, or to such imprisonment and the payment of a fine, or the payment of a fine, he shall be committed to jail, there toremain in close confinement for the full time specified for imprisonment in

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the sentence of the court, and until the fine, costs and jail fees be paid, unless discharged by due course of law or as herein provided; this section subject to the later provisions of this act."

Section 4016, Hemingway's Code, chapter 109, Laws of 1908, provides:

"The board of supervisors of the several counties of the state may dispose of the county prisoners in the following manner and no other, viz.: They may be worked on a county farm, or farms; they may be kept in jail, or they may be worked on the public roads, or any other work of an exclusive public character, but never under a contractor, and only under exclusive official control and management."

Other sections of the act provide for classification of convicts and rate of wages which are to be allowed convicts while they work, which is fixed between eight dollars and twenty dollars a month for first class convicts.

Section 4025, Hemingway's Code, chapter 109, Laws 1908, provides:

"On delivery of every convict the sheriff or marshal, or head police officer of the municipality shall give to the person entitled to his custody a warrant of detention as authority for the detention of the convict, unless he pay out before that time until a certain day, and such warrant shall set out that on the day named he shall discharge him and deliver to him the warrant with indorsement thereon that the convict has been duly discharged and such warrant shall be the sole authority of any person to detain a convict in custody."

It is insisted by the appellant that the case of *Ex parte Moody,* 104 Miss. 836, 61 So. 741, is authority for the proposition that he could only be held by having the original detention warrant. After setting out the facts showing that the sheriff's predecessor in

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office was Myers, and that the jail docket showed the detention warrant issued to the convict manager, but that there was no proof of actual delivery of the detention warran to the convict manager, the court said:

"This evidence was introduced, we presume, for the purpose of proving that a detention warrant had, in fact, been issued and delivered to the county convict manager. Assuming, but not deciding, that such proof, if made, would meet the demands of the statute, this evidence, is insufficient for that purpose. It will be observed that the sheriff's testimony simply tended to prove that a detention warrant was made out by his predecessor, but wholly failed to even indicate that it was in fact delivered to the county convict manager. Under the statute hereinbefore cited, such a warrant is the sole authority under which a county convict manager can detain a convict in custody, and in the absence of such a warrant here, relator was entitled to his discharge."

In the present case it clearly appears that the original warrant was delivered by the sheriff to the convict manager, and that the original warrant after the escape was sent to the Governor of Louisiana, and not returned, and that a duplicate was issued by the sheriff and turned over to the convict manager on Moody's recapture. We think this is a sufficient compliance with the law. It was never contemplated that, if the detention warrant should be lost or accidentally destroyed, another could not be issued. Such loss or destruction would not release the convict from custody, but a duplicate or alias could be issued. We do not think the detention warrant was void because it authorized the detention to continue beyond two years from its date. The convict after serving five months was entitled to pay the fine and costs, and at any time thereafter to do so and be discharged. Before he had served two years, he escaped and has not been

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in the service of the convict manager, nor in the county jail for a period of two years. Conceding that two years is the limit which he might be held for the purpose of this case, his right to a discharge would not accrue until he had been in custody for two years. He is not entitled to have the time which elapsed during his period of escape counted in the making of a two-year period. The trial court having reached the same conclusion, the judgment will be affirmed.

Affirmed.

STEVENS, J. (specially concurring).

I fully concur in the conclusion and the opinion of the court in this case, but fail to perceive any material difference between this case and the prior case of *Ex parte Moody,* 104 Miss. 836, 61, So. 741, relied upon by appellant as controlling. In the case relied upon, it affirmatively appeared from the evidence that the sheriff in making out detention warrants made use of "a blank book containing a form of detention warrant in triplicate, the original being delivered in any particular case to the convict manager, one duplicate turned over to the clerk of the board of supervisors, and the third kept in said book, without being torn out, as a record in the sheriff's office;" and that the custom was "that carbon was used in filling out the detention warrants, so that each duplicate was made with the same stroke of pen or pencil as the original." It further affirmatively appeared:

"That the records . . . showed the detention warrant issued . . . by Walter Myers, sheriff, to E. M. Combs, convict manager, authorizing the detention of Frank Moody on said charge of larceny, and witness thereupon produced, at the request of the trial judge, the duplicate of said detention warrant and introduced same in evidence." And that this dupli-

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cate "was in the handwriting of Walter Myers, sheriff, and that he well knew said handwriting."

In other words, in the prior case an exact duplicate constituting an official record in the sheriff's office was produced and introduced, and there was no suggestion from any source that the original had never been delivered. Notwithstanding the showing there made, the court concluded that: "Under the statute hereinbefore cited such a warrant is the sole authority under which a county convict manager can detain a convict in custody, and, in the absence of such a warrant here, relator was entitled to his discharge. *'Ita lex scripta est.'*"

In the prior case, as in the present case, it appeared that there had been a change in convict managers, and evidently on this account the original warrant could not be conveniently produced. I think, however, the prior decision was erroneous and should be overruled, and for that reason should not control the present inquiry. Surely a convict manager does not lose his prisoner simply because he loses the written document under which the prisoner is detained, any more so than a freeholder would lose his land simply because his deed of conveyance is lost or destroyed.

KING v. JONES.

[83 South. 31, In Banc. No. 20933.]

1. MORTGAGES. *Substitution of trustees. Validity of substitution.* Under Code 1906, section 2773 (Hemingway's Code, section 2277), providing that a sale under a deed of trust by a substituted trustee shall be void unless the substitution "appears on the record" in the office of the chancery clerk by being actually spread at large upon the record, it was a compliance with the

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statute where the substitution was lodged with the clerk and copied by him on the margin of the record of the deed of trust, and such notation was signed by the beneficiary under the supervision of the clerk, though the clerk did not attest the notation on the record.

2. SAME.

As to whether or not the substitution of a trustee recorded by notation on the record by the beneficiary without the knowledge of the clerk is valid, is not decided by the court.

APPEAL from the circuit court of Holmes county.

HON. J. B. GUTHRIE, Special Judge.

Action by James King against W. E. Jones. Judgment for defendant and plaintiff appeals.

The facts are fully stated in the opinion of the court.

Wise & Bridgeforth, for appellants.

Was the substitution of G. C. Reid, as trustee in the deed of trust above referred to, valid and in accordance with law, so that he could convey to the grantee at the sale under the deed of trust a good title to the property involved? If this question is answered in the affirmative then the decision of the lower court must be affirmed; if in the negative, then it must be reversed. The contention of the appellant that the substitution of Mr. Reid, as substituted trustee in this deed of trust, is invalid and ineffectual; that the sale made by Mr. Reid, as substituted trustee is illegal and void and that no title passed to the grantee at the sale, therefore, the decision of this one question depends upon the interpretation given to section 2773 of the Code of 1906 (Hemingway's Code, section 2277). which section first appeared in a slightly different form in our laws as chapter 96 of the Laws of 1896, For the sake of convenience, we wish to copy the whole section into this brief, and request the indulgence of the court in so doing:

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"2273. Substitution of trustees must appear of record. (Laws 1896, ch. 96)—Sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor or grantors therein but shall be absolutely null and void, both at law or in equity, unless the substitution shall appear of record in the office of the chancery clerk of the county where the land is situated, and unless it shall so appear by being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published, the filing or lodging with the clerk not being sufficient. Such substitution, however may so appear by a separate instrument recorded as above set in all respects, or a copy of such substitution may be recorded as above set out."

By the unquestioned interpretation of this statute, the substitution of a trustee, where not "of record," illegal and ineffectual; and sales made by a so-called substituted trustee, whose substitution is not "of record" are null and void and do not convey the interest of the grantors. *White* v. *Jenkins,* 79 Miss. 57, 28 So., 570; *Hyde* v. *Hoffman* (Miss.), 31 So., 415; *Shipp* v. *New South Building & Loan Assn.,* 81 Miss. 17, 36 So., 285; *Folk* v. *Dale,* 93 Miss. 663, 47 So. 386; *Proviine* v. *Thornton,* 92 Miss. 395, 46 So., 950. We wish to establish this unequivocal and undebatable interpretation of this statute, as the major premise in our argument, and have burdened the court with the citation of the five best cases sustaining it; and in all subsequent portions of the brief, we will take the proposition as demonstrated without the citation of further authorities. No unrecorded substitution being valid, and all sales made by a substituted trustee, whose substitution does not appear of record, being void, it only remains for the appellant to show that the appointment of the substituted trustee did not appear of record in the office of the chancery clerk of

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Holmes county, in order to answer in the negative the sole question involved in this case, and thus to make plain that a reversal of the lower court is the proper judgment of the supreme court.

After carefully reading the statute, it will be seen that the first complete sentence in the section lays down a rule of law: ("Sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor or grantors therein but shall be absolutely null and void, both at law and in equity, unless the substitution shall appear of record in the office of the chancery clerk of the county where the land is situated . . .) and the regular method of complying with the requirements of that rule of law: (". . . and unless it shall so appear by being actually spread at large upon record before the first advertisement or notice of sale shall have been posted or published; the filing or lodging with the clerk not being sufficient.") The second, or last complete sentence in the section merely provides an additional method of complying with the requirements of the rule of law laid down in the first part of the first sentence: "Such substitution, however, may so appear by a separate instrument recorded as above set out in all respects, or a copy of such substitution may be recorded as above set out.") and operates so as to give the beneficiary in the trust deed the option of choosing between two methods of doing a thing the doing of which thing the statute makes obligatory.

The method of recording a substitution provided in the second sentence of the section as shown above makes the act of recording the substitution equivalent to the recording of a separate instrument, as a deed, for instance (". . . a separate instrument recorded as above set out in all respects" . . .), and requiring the acknowledgment of the grantor or maker, the beneficiary of the trust deed in this particular instance.

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(See section 2793 of the Code of 1906, Hemingway's Code, section 2294),—all which is quite a formal and solemn procedure; but the use to us of this "second method" in this particular case is not direct, but only to furnish us the basis of an argument by analogy, for the substitution made in this case but not recorded, was only by notation without pretense of a separate instrument. As far as this phase of the case is concerned, the situation is much the same as in the case of *Provine* v. *Thornton,* 92 Miss. 395, 45 So. 950, where (quoting 46 So., 951)," . . . There was certainly no substitution by a separated instrument, recorded as other recordable instruments, because the paper of substitution was not acknowledged, so as to be recordable, and it was not pretended to be recorded as a separate instrument." Under this second sentence will also be found a clause offering the alternative recording as a separate instrument, at the maker's pleasure, not the original paper carrying the substitution, but a copy of the same: ("or a copy of such substitution may be recorded as above set out,"—that is, when the copy of the separate instrument is acknowledged it may then be recorded.) As we understand this second sentence, it provides a formal means of recording a substitution of a trustee, as all other separate instruments are recorded.

We now turn to the normal method of recording a substitution of a trustee, as provided in the first sentence of the section, so that the acts of the trustee may have force and efficiency; applying the legal method to the careless action of the beneficiary of the trust deed in the instant case, the purpose of the beneficiary, Mr. Perry was to so proceed that the substitution should appear of record in the office of the chancery clerk. It is important to keep this in mind that the requirement of a statute is, putting the matter generally again, that the substitution shall

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appear of record, else the substituted trustee's acts are invalid. Before turning directly to the statutory acts necessary to make the substitution appear of record, would it not be well to see what the legal meaning of the appearing of record is: See where the legal goal of all acts we must perform in making the substitution appear of record is situated. In other words would it not be well to see just what appearing of record is? Then we would have a clear guide to lead us in ascertaining the particular points in the statutory way leading to the goal.

First what is a "record?" A record is "a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." *Bouvier's* Law Directory (14 Ed.): "To constitute a valid record it (i. e., the filing of an instrument) must be made by an officer having the authority to do so, and if made by a person having no authority whatever it is void." 34 Cyc., 589-590: "Recording means the copying of the instrument to be recorded into the public records in a book kept for that purpose, by or under the superintendence of the officer therefor." 23 Ruling Case Law, 1822, par. 38. "The admission to record" consists not only in bringing the deed or writing to the clerk, or lodging it with him to be recorded, but in the indorsement by the clerk upon the deed or writing, when delivered to him, of an order directing it to be recorded. Such admission of the deed or writing to record has the same effect as if the writing were actually spread *in extenso* upon the deed book." Minor, Real Property, page 1565, section 1393: "The term recorded as used herein signified a written account, memorial, or memorandum of some act, speech, transaction, or instrument made by a public officer authorized to perform that function, for the purpose of having it remain as permanent evidence of the matters

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to which it relates; or a writing properly filed in a public office." Am. & Eng. Ency. of Law (2 Ed.), 159. Authorities of a like nature might be multiplied almost to infinity, but it is our effort to bring only sufficient authority to recall forcibly to the mind of the court the necessity of an act on the part of the custodian of the record in order to make any instrument of writing a part thereof. The word "appear" has no peculiar meaning, and it seems is only used in the ordinary layman's meaning of the same. Taking the two together, "appear of record" can only mean showing or being a part of the properly written memorial by and because of the legal act of the proper custodian of particular written memorial.

The statutory way to reach our goal, the legal and ordinary method, as provided in the latter part of the first sentence of the section, is that "it shall so appear by being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published; the filing or lodging with the clerk not being sufficient." Analyzing these directions we find the steps to be as follows: (1) "It shall so appear" how? Of record, most certainly for "so" can relate back only to "of record." Here the statute at first blush seems needlessly repeating the final situation which is to be reached, viz: that the substitution must be made "of record" but on closer inspection, the evident intention of the legislature was to import into the method of making the substitution "appear" all that the word "record" carries with it —the action of the clerk in his official capacity, the exclusion of all other parties from taking action even of the clerk himself when not acting as a clerk.

(2) "By being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published" . . . in what manner? By being written on the face of the

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page of the record where the deed of trust is recorded, by the proper custodian thereof and marked as his own for one as was attempted in this case.

(3) "The filing or lodging with the clerk not being sufficient"—why? Because filing or lodging is not recording. But the great value of this clause in the instant case is that it reaffirms the necessity of action on the part of the clerk. Surely the inexcusable inference is that if neither the action of the beneficiary in filing or lodging the substitution with the clerk is sufficient, then the official act of this custodian in actually making the substitution a record is necessary.

Our court has never expressly interpreted this particular portion of the statute relating to the method of making the substitution appear of record, as shown by the latter part of the first sentence. But surely some evidence of the clerk's action must be manifest in order to make a substitution which has been merely noted on the margin of the page or record book a muniment of title. Merely lodging a deed, or deed of trust, or marriage settlement with the clerk is sufficient to make it valid against the whole world (See sections 2784, 2786, and 2787, of the Code of 1906, Hemingway's Code, section 2288, 2290, and 2291); but a substitution of a trustee must become of actual record, mere lodging not being sufficient, before the first notice of the sale is made, else all the acts of the substituted trustee are invalid and ineffectual, where a satisfaction of the indebtedness due under a deed of trust is made, it must be entered upon the margin, and at least attested by the clerk. Section 2781 of the Code of 1906, Hemingway's Code, section 2285. Then if a substitution is to be actually recorded, not lodged for record, surely a clerk in his official capacity must record the substitution and leave some "ear mark" of his official action. It has been held that the mere pasting of a map betwen leaves of a

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record book does not make the map a record in a legal sense, although the map has been actually attached to the proper record. *Caldwell* v. *Center,* 30 Cal. 539, 89 Am. Dec. 131. Although the court gave no reason for its decision, it is obvious that the mere pasting of the map in the record gave no proof of the official action of the clerk or recorded, without whose action no instrument might become a part of the record.

Several different purposes have been attributed to the legislative mind in the passage of the section 2773 of the Code of 1906. These purposes have been summarized by CALHOUN, J., in the case of *Provine* v. *Thornton, supra,* (quoting from 46 So. page 951, and 92 Miss., page 402); "We cannot escape the conclusion that the result of the decisions of our court means that this substitution must precede the sale, and must so appear that it would furnish evidence of title to the purchaser at the trustee's sale such as would be good in an action of ejectment. It is said in the case of *Hyde* v. *Hoffman* (Miss.), 31 So. 415, 416, that the statute was intended, not only to give security to titles, but to induce bidders to offer a fair price for the property soldd. *White* v. *Jenkins,* 79 Miss. 28 So. 570; *Shipp* v. *New South B. & L. Assn.,* 81 Miss. 17, 32 So. 904, in the last case the court: "It was the very purpose of the statute that there should be record of such substitution as of all other substitutions of trustees.

No brief of record of attorneys for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellant, James King, sued the appellee, W. E. Jones, in ejectment for the possession of the land involved in this suit. Upon the conclusion of the testimony a peremptory instruction was granted the appellee, defendant below, from which this appeal is prosecuted.

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The correctness of the action of the lower court depends entirely upon the settlement of one question in the case, and that is whether or not the appellee, Jones, obtained a valid title to the land under a foreclosure sale.

Appellant, King, had executed a deed of trust upon the land in favor of one Mobley, trustee, for the benefit of one Perry. Upon failure to pay the amount due under the deed of trust, the beneficiary, Perry, substituted one G. C. Reid as trustee in the place of the said Mobley. The substitution written upon the deed of trust was in the following language:

"I hereby appoint G. C. Reid as substituted trustee instead of M. C. Mobley to execute this deed of trust. [Signed] W. W. Perry.
2/1/1911."

The beneficiary, Perry, lodged this substitution with the chancery clerk of the county, who, through his deputy, copied it on the margin of the record of the said deed of trust, and Perry signed this marginal notation of the substitution. Following this the substituted trustee proceeded to sell the land under the terms of the deed of trust, after having given the proper notice, and executed a deed to the purchaser, who afterwards deeded it to the appellee.

The precise inquiry is whether or not there was a legal and valid recordation of the substitution of the trustee so as to make it appear of record as required by section 2773, Code of 1906, section 2277, Hemingway's Code, which is as follows:

"Substitution of Trustee Must Appear of Record.—Sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor or grantors threin, but shall be absolutely null and void, both at law and in equity, unless the substitution shall appear of record in the office of the chancery clerk of the county where the land is situated, and

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unless it shall so appear by being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published; the filing for record or lodging with the clerk not being sufficient. Such substitution, however, may so appear by a separate instrument recorded as above set out in all respects, or a copy of such substitution may be recorded as above set out. (Laws 1896 c. 966.)"

Putting the question in another way: If the substitution of the trustee here did not appear of record before the first notice of sale was made, this sale is absolutely void, and the appellant would be entitled to reversal because he would still have the legal title to the land; but, if the notation upon the margin of the record of the deed of trust by the chancery clerk in the manner and language employed here is a substitution "appearing of record" in the office of the chancery clerk, then the statute has been substitutally complied with and the sale was void. It will be observed that the statute provides two methods whereby the substitution of the trustee may be recorded. The method first appearing in the section is the one that was pursued by the beneficiary in this case. This court has never decided the point involved. However, we find no great difficulty in reaching the conclusion that the statute was substantially complied with and that the sale by the substituted trustee was legal and valid in the case before us.

The contention of appellant that the notation of the substitution on the margin of the record of the deed of trust was unofficial and not a legal and valid recordation of the substitution because the notation on the record did not appear by official attestation to have been made by the chancery clerk, or under his direction or supervision, is untenable, in our judgment, for the reason that the evidence in this case shows as a matter of fact that, while the chancery clerk did not attest

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the notation on the record, nevertheless he wrote it there and it was signed by the beneficiary under the supervision of the clerk. Certainly the clerk "spread" the substitution upon the record in the performance of the functions of his office. The clerk having made the notation on the record under his charge, the substitution then and there legally "appeared of record." Of course, the notation record of the substitution of the trustee would have been more satisfactory and conclusive had the clerk attested the notation and signature of the beneficiary; but, in the absence of such attestation by the clerk, the proof offered in this record was competent to show that as a matter of fact the clerk did in his official capacity spread on the record the substitution of the trustee by writing it there and seeing it signed by the beneficiary.

We have carefully avoided passing upon the question of whether or not the substitution of a trustee recorded by notation on the record by the beneficiary without the knowledge of the clerk is a valid and legal record of the substitution. We do not decide this point because it is unnecessary to do so. In the meantime the legislature may make the statute clearer in this regard by some change or amendment thereto.

The judgment of the lower court is affirmed.

Affirmed.

MERIDIAN SANATORIUM v. SCRUGGS.

[83 South. 532, In Banc. No. 20889.]

1. HOSPITAL. *Private hospital liable for negligent injuries to patients.* A hospital conducted for private gain is liable in damages to patients for injuries resulting from negligence of the nurses and employees, since a patient is generally admitted to such a hospi-

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tal under either an express or implied obligation, that he shall receive such reasonable care and attention for his safety as his mental and physical condition if known may require.

2. APPEAL AND ERROR. *Instructions. Harmless error.*
In an action against a private hospital for injuries sustained through negligent treatment, the giving of an instruction that. if plaintiff was injured as a result of the negligence of the employees and nurses of the hospital, as testified by plaintiff's witnesses, the jury should find for the plaintiff, though not technically correct was not reversible error.

3. SAME.
An instruction should state a hypothesis and the jury should be told that if they believe from the evidence the facts constituting such hypothesis they should find for the plaintiff.

4. APPEAL AND ERROR. *No reversal because instructions not technically correct.*
The supreme court will not reverse a case because instructions are not happily phrased or because not exactly technically correct, so long as the instructions are not misleading or the inaccuracy complained of could have had no influence in reaching a verdict that could be said to be improper.

APPEAL from the circuit court of Lauderdale county.
HON. R. W. HEIDELBERG, Judge.

Suit by Mrs. S. O. Scruggs against the Meridian Sanatorium. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Marion W. Reiley, for appellant.

Can the appellee recover damages for negligent handling of the wound after the injury, when she did not sue for injuries caused by such negligence? How did the appellant know that a contention would be made that the wound was negligently handled after the injury was sustained?

In the case of *Barefield* v. *South Highland, etc.,* 68 So. page 30, which is an Alabama case, it was held

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that where suit is brought for alleged negligence in performing an operation, it was error to admit evidence of negligence touching treatment of wound after the operation was performed.

In the case at bar, evidence was offered as to the negligent treatment of the injury after the injury was sustained and the appellant objected to such eveidence, but the court overruled the objection and admitted the testimony. Not only is this true, but the court told the jury that if the plaintiff was injured "in the manner testified to by the witnesses for the plaintiff" then the jury should find for the plaintiff.

The second instruction given for the appellee was reversible error because the jury was told that if Mrs. Scruggs was injured as a result of the negligence of the apellant "in the manner testified to by the witnesses for the plaintiff, etc.," then you should find for the plaintiff.

Witnesses for the plaintiff had testified that the foot was neglected after the injury was sustained. Witnesses for the plaintiff had testified to many things and the jury was allowed under this instruction to decide what was negligence and what was not negligence. It is the province of the court to instruct the jury of the circumstances under which negligence may be inferred. It is not the province of a jury to say simply because a witness for a plaintiff testified to that course of conduct.

The trial court erred in giving the fourth instruction for the appellee which is to be found on page 172 of the record, wherein the jury was told that the appellant was required to give all attention necessary to her comfort and relief, commensurate with her condition at the time This was clearly erroneous. The sanitarium was required to give reasonable attention and was not required to give all attention. This instruction was misleading to the jury and should not have been given.

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For the above reasons, I humbly submit that this case should be reversed and judgment entered here for the appellant, because the appellee has had her day in court and failed to make out a case, and the peremptory instruction asked by the appellant at the conclusion of the instruction of the testimony should have been granted.

W. L. Scott, for appellee.

Having not seen the assignment of error or the brief of counsel for appellant as yet, it is not altogether easy for counsel for appellee to anticipate what position will be assumed by appellant as a ground for reversal.

The case of *Faucett* v. *Reily,* 135 N. W. 800, is one almost identical with the one at bar, and it together with case in Am. and Eng. Anno. Cases, Vol. 1915, p. 1224, is authority for the statement: "A private hospital, operated for gain is liable in damages to a patient therein for the negligence of nurses therein in permitting a hot water bag or bottle to come in contact with the body of such patient and burning same."

I do not think there will be found any authority in conflict with the above statement that the cause was tried along this line, the instructions where drawn upon this idea, and the cause submitted upon this theory.

The same principle of law is involved in the case of *Richardson* v. *Dumas,* 64 So. 459, holding that the owner or proprietor of a private hospital which is not charitable, but is operated for gain or profit is liable in damages for the negligence of his employees resulting in injury to a patient therein.

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I submit there was no reversible error committed in the trial of this cause, and that same should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The appellee brought suit against the appellant, alleging that the defendant, appellant here, was a corporation which owned and operated a sanatorium for hire or gain and employed nurses therein, and that the plaintiff was admitted to the hospital as a patient to undergo a surgical operation and to be treated for certain internal physical troubles from which she was then and there suffering; that she was placed upon the operating table by certain officers and employees of the defendant, and was placed under the influence of an anæsthetic and operated upon, and that after said operation she was turned over by the officers and managers of said institution to certain nurses to be by them returned to a bedroom in said institution, which they did; that while she was unconscious from the effects of the said anæthestic a hot water bottle, or bag, filled with hot water, was placed against her right foot, while she was unconscious, by said nurses and employees, which bottle, or bag, was permitted to remain against her foot for several hours, and, while she was still under the influence of said anæsthetic and unconscious, her right foot and ankle were seriously burned and scalded, so as to cause the flesh on her right foot to slough off almost to the bone, and caused her to suffer indescribable pain for many days and nights, and to be crippled, and her nervous system greatly shocked and impaired, causing her physicial pain and mental anguish, and the expenditure of large sums of money for nurses and attention. The defendant pleaded the general issue, and also gave notice that the defendant would offer evidence to prove

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that plaintiff was suffering from injuries when she reached the sanatorium, and that such injuries were caused otherwise than through the fault of the defendant or its agents and employees. The plaintiff and her witnesses testified that she was placed in the bed in an unconscious condition after being operated upon, and that she remained under the influence of the anæsthetic for several hours, and that when she became conscious she was suffering pain in her foot, and complained thereof to the nurses and attendant, and the nurses told her that such pain was not unusual after an operation, and tried to have her believe that the pain was the result of the operation; that her physician, who was also a stockholder of the corporation, examined the burn the following morning, and stated that they let hot water bottles rest upon her foot and burned it. She also testified that when she saw her foot she saw the burn, and that she had no trouble or injury on the foot prior to the operation. She also testified that the bottles were removed from the bed afterwards by the employees of the hospital. Her story is corroborated by her husband and other witnesses.

The defendant's contention is that the injury to her foot was caused from shoes, and that the plaintiff's foot was blistered when she reached the hospital, and that her system was so infected with septic poison, caused from the accumulated pus in her Fallopian tubes, which existed at the time of the operation, that such pus was absorbed into the system, poisoning her body, and that such sores were likely to result from such poison, and in the opinion of the medical witnesses the injury was caused from such condition. The medical witnesses also testified that a burn would not be infected as this place was infected, unless it was inoculated from external causes or application. The plaintiff left the hospital about two weeks after the

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operation, and was attended by a trained nurse who, she says, was recommended by the physician in charge of appellant and who performed the operation on her, plaintiff stating that the doctor told her the nurse was as competent to tend to the injured foot as he (the doctor) was. It appears from the doctor's evidence that he was opposed to the plaintiff leaving the sanatorium as early as she did, but that he finally consented that she might go home, attended by the nurse, but that he did not recommend the nurse as being competent, and that this nurse was related by marriage to the plaintiff, and that the plaintiff suggested this nurse herself. It further appeared that the nurses employed in the hospital were not graduate nurses, but were being trained by Dr. Castle, a woman physician who was in charge of the sanatorium as superintendent. It is contended by the appellant that the evidence is insufficient to justify a verdict, and that the defendant should have had a peremptory instruction, a peremptory instruction having been refused the defendant by the court.

The evidence, we think, is ample to support a verdict, and that a hospital conducted for private gain is liable in damages to patients for injuries resulting from negligence of the nurses and employees. A patient is generally admitted to a hospital conducted for private gain under either an express or implied obligation that he receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. *Wetzel* v. *Omaha, etc., Hospital Ass'n,* 96 Neb. 636, 148 N. W. 582, Ann. Cas. 1915B, 1224; *Fawcett* v. *Ryder,* 23 N. D. 20, 135 N. W. 800.

It is also insisted that instruction No. 2, given by the plaintiff, is error which should reverse the cause. This instruction reads as follows:

"The court charges the jury for the plaintiff that if you find from a preponderance of the testimony that

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the defendant corporation operated a private hospital or sanatorium for gain in the city of Meridian, that plaintiff was admitted therein as a patient for hire, and that she was injured as a result of the negligence of the employees and nurses of said defendant in the manner testified to by the witnesses for the plaintiff, then you should find for the plaintiff in such sum as you find from all of the evidence is right, just, and proper."

It is urged that that part of the instruction which instructs the jury that, if the plaintiff was injured as a result of the negligence of employees and nurses of said defendant in the manner testified to by the witnesses for the plaintiff, the jury should find for the plaintiff is error. We do not think this instruction is reversible error. The instruction should state a hypothesis, and the jury should be told that if they believe from the evidence the facts constituting such hypothesis they should find for the plaintiff or according to the contention, but in the present case the facts constituting the plaintiff's theory are testified to clearly and directly, and there is no conflict between the different witnesses testifying for the plaintiff, and no prejudice or injury could result to the defendant under the facts of this case by giving this instruction. The court will not reverse a case because the instruction is not happily phrased, or because not exactly technically correct, so long as the instruction is not misleading, or where the inaccuracy complained of could have had no influence in reaching the verdict that could be said to be improper. Substantial accuracy is all that is required in an instruction, and unless the court can see that the jury may have been mislead, it will not reverse.

The judgment is therefore affirmed.

Affirmed.

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STATE EX REL. HORTON v. LAWRENCE ET AL.

[83 South. 532, In Banc. No. 20155.]

MANDAMUS. *Properly dismissed when question becomes moot.*

Where before a petition for mandamus to compel a recount of votes at a primary election is heard, the election at which the petitioner desired to run as the nominee had been held, the petition was properly dismissed by the court.

APPEAL from the circuit court of Grenada county. HON. THOS. L. LAMB, Judge.

Petition for mandamus by the state on the relation of Horton against O. F. Lawrence and others. Petition dismissed and relator appeals.

The facts are fully stated in the opinion of the court.

Cowles Horton and *W. M. Mitchell,* for appellant.

McLean, Carothers & McLean, for appellee.

SMITH, C. J., delivered the opinion of the court.

Anderson and Horton were candidates in the primary election held on the 26th of August, 1919, for the nomination by the Democratic party as its candidate for the office of supervisor of beat No. 3 of Grenada county in the election held in November, 1919. The county executive committee declared Anderson the party nominee. On November 3, 1919, a petition for a mandamus was filed on behalf of Horton, praying that the county executive committee be ordered to reassemble and count the votes cast in the primary election, and to declare Horton the party nominee. A summons was issued on this petition returnable before the circuit judge in vacation on the 14th day

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of November, 1919. The regular election in which Horton sought to run as the candidate of the Democratic party for the office of supervisor was held on the 4th day of November, 1919.

When the cause came on for trial, the circuit judge dismissed the petition, and committed no error in so doing, for the reason that since the election in which Horton desired to run as the candidate of the Democratic party for the office of supervisor had been held a recount of the votes cast in the primary election would have availed Horton nothing, even though it should appear therefrom that he should have been declared the nominee. The question presented by the petition is a mere moot one, and the courts do not entertain such.

Affirmed.

HENDERSON & MATHIS *v.* HINES, DIRECTOR OF RAILROADS.

[83 South. 589, In Banc. No. 20929.]

1. RAILROADS. *Engineer required to keep lookout for stock on unfenced track in pasture.*

An engineer, operating a locomotive on an uninclosed track through an inclosed pasture, is required to keep a lookout for stock while not engaged in other duties, and not merely to exercise reasonable care after discovery of the stock on the track in a place of danger, since the stock in such case are not trespassers on the track.

2. APPEAL AND ERROR. *Erroneous instruction on damages harmless where verdict for defendant.*

In an action against a railroad for the death of a mule an instruction on comparative negligence was harmless where the verdict was for the defendant.

3. NEGLIGENCE. *Comparative negligence inapplicable to injury to animal by railroads.*

The comparative negligence statute has no application to injury of personal property.

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APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by Henderson & Mathis against W. D. Hines, Director General of Railroads. From a verdict for defendants, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

P. Z. Jones, for appellant.

The first instruction set out on page 6 for the defendant is erroneous because not in accordance with the evidence and because it is not the law that the engineer is required to keep no lookout for stock; it is the duty under the law for the engineer to keep a lookout for stock or any other obstruction on the track in front of his train. This is his duty for two reasons, first for the safety of his train, and second, to prevent accident to live stock that may be on the track, and in a pasture through which an unenclosed railroad track runs he is required to keep a lookout for stock grazing in the pasture for he is bound to know as a matter of common knowledge that stock are likely to go on the railroad track.

This is the rule as we gather it from the decisions of our court and others. The only exception is where, for the time being, the engineer may be engrossed with some work about his engine requiring his attention in the safe operation of the train. His first duty is of course to run his train and run it safely, and his second duty is to keep a lookout for a clear track. The second is almost inseparable from the first. How can an engineer run his train if the track is not clear and safe and how can he know that the way is open and clear unless he keeps a lookout? *Scott* v. *R. R. Co.,* 72 Miss. 37; *Dickerson* v. *R. R. Co.,* 110 Miss. 898, 46 Miss 573; *R. R. Co.* v. *Patton,* 31 Miss. 156; *R. R. Co.* v. *Miller,* 40 Miss. 45; *R. R. Co.* v.

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McNeil, 61 Miss., 434, 59 Miss. 465; *R. R. Co.* v. *Cantrell,* 69 Miss. 435; *Cantrell* v. *R. R. Co.,* 24 So. 871, 64 Miss. 115; *R. R. Co.* v. *Morrison,* 107 Miss. 300; *R. R. Co.* v. *Kea,* 66 So. 735; *R. R. Co.* v. *Frasier,* 104 Miss. 372; *R. R. Co.* v. *Calhoun,* 68 So. 443; *R. R. Co.* v. *Jones,* 111 Miss. 159; Notes, 24, L. R. A. (N. S.) 858; *Howard* v. *R. R. Co.,* 67 Miss. 247, 11 L. R. A. 460; 1 Rapalje & Mack's Digest Railway Law, par. 62, page 118.

This instruction gives the jury the idea that it was immaterial that a drove of mules was on the track, either on the side or in front of the train. That the engineer was unconcerned about this and owed no duty to the plaintiffs or others to look out for the mules and that he was under no obligation to do anything to avoid striking the mules. In other words he can run right into a drove of mules and kill, maim, injure and destroy without accountability to any one.

In the case of *Jones* v. *R. R. Company,* or *vice versa,* 111 Miss. 159, at page 160, Judge COOK makes use of this sentence: "There is no obligation on the servants of the company to keep a lookout for trespassing stock."

This is the only expression in any of the cases we find that justifies the instruction given in this case. In that case the injury occurred while the train was being run in the country, not in a pasture, and the stock are designated as trespassing stock. This of itself is sufficient to differentiate the two cases, for here the stock were in a pasture and the railroad company was charged with knowledge of the fact that stock would go on the track, that is stock pasturing in the enclosure. *Vicksburg & Jackson R. R. Co.* v. *Patton,* 31 Miss. 156. We do not think that the expression of Judge COOK correctly states the law, and besides in that case it was *obiter dictum,* as the testimony in that case was that the engineer was looking ahead.

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See statement of the facts. He testified that he was running his train about fifty miles an hour in the country, and that he was in his proper place on the engine, keeping a lookout ahead, and that his headlight revealed the mules on the track about four hundred or five hundred feet ahead of the train, etc. He further testified that he shut off steam, blew the stock alarm and applied the emergency brakes. With the engineer doing all of this and keeping a direct lookout ahead there was no use of the expression because the issue as to whether it was or was not his duty to keep such a lookout was not presented for discussion by the lawyers in the case or decision by the court.

So also in the present case, the instruction was lugged into the case unnecessarily because the engineer testified that he was keeping a lookout. All the circumstances as testified to by the witness for the plaintiff would indicate that he was not, but the jury could very readily infer from this instruction that it was unnecessary for them to decide this point because the court had told them by this instruction that he did not have to keep a lookout ahead.

The duty of the engineer to keep a lookout is stated in the following language by this court through Judge CAMPBELL in the case of *Howard* v. *Railway Company*, 67 Miss., at page 249: While a lookout should be kept when running, it is not want of proper care for the servants of the company to give needed attention to their primary duty which is the operation of the engine.

There was no evidence in this case that the engineer was engaged in some duty about the operation of his engine which took his attention away from the track in front of his engine. In fact he said that he was looking ahead. The instruction was in direct conflict with both the evidence and the law as announced above in the case cited.

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In the case of *Railroad Company* v. *Morrison,* 107 Miss. 300 to 304, the engineer testified that the train was properly equipped with all necessary appliances for safe use, and that it was under control, and that he was on the lookout.

In the case of *Railroad Company* v. *Frazier,* 104 Miss., at page 377, it is shown that the engineer was in his proper place on the engine, and on the lookout.

In the case of *Harris* v. *Railway Co.,* (Okla.), 103 Pac. 758, 24 L. R. A. (N. S. 858, the rule is stated as follows: It is not enough for the engineer and fireman in charge of a railway locomotive and train to use diligence merely in driving animals away that are discovered upon the track; they should keep a vigilant lookout and exercise ordinary diligence to frighten away animals that may be discovered approaching, etc.

In the notes to this case where many authorities are collected and considered the rule is stated to be: "By the great weight of authority it is held to be the duty of those in charge of locomotives to keep a lookout for live stock on or near the track in order that they may prevent injury thereto, the care required in doing so being a reasonable and ordinary care."

In 11 L. R. A., page 460, the notes state that "It is the duty of the employees of a railroad company to keep a lookout for stock on the track." The instruction given in this case tells the jury that it is not their duty to keep a lookout.

The evidence in this case shows that the place where the mule was struck was straight with nothing to obstruct the vision and nothing to divert the attention of the engineer. There is no testimony that at the time he was engaged about any work on his engine.

Instructions two and three single out a portion of the evidence and draw the attention of the jury to one

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portion of the testimony, and lead the jury to believe that it was the mule said by the fireman and engineer that ran across the track in front of the engine and going north of northwest that was hit, and thus the testimony of the plaintiffs and their witness to the effect that there was a drove or bunch of mules on the track and on either side of the track for a distance of one hundred and fifty to two hundred feet or more and that the injured mule was found on the south side of the track and trailed from the track to where he was found by the blood and the tracks of the mule was completely ignored.

Of course if the engineer and fireman were on the lookout and never saw any mule or mules, or if they were temporarily engaged about some part of their work that diverted their attention from the track in front of the train, and never saw the mule until just as it ran in front of the train and too late to avoid the accident, the defendant is not liable. But the court told the jury that they were not required to be on the lookout and that if the mule which the fireman saw or said he saw ran in front of the train so near that they could not prevent the train from striking it then the defendant was not liable.

The employees of the defendant were required by law to be on the lookout unless their time and attention was absorbed in their work or some part of their work requiring attention elsewhere, and as the evidence does not show that the engineer was engaged in other work and as he testified that he was on the lookout, on his engine seat looking ahead, the jury should have been left free to say whether he saw or by reasonable care should have seen the bunch of mules on track and on the sides of the track and left to consider whether it was one of this bunch which he could have seen, instead of being limited to the one crossing to the north just in front of

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the train. The testimony was that these mules ran down the track and from this testimony it is to be inferred that one of these mules was killed, but the defendant's instructions draw particular attention to the one mule that was crossing in front of the train and told the jury that if this mule was not killed then their verdict should be for the defendant. We submit that this is the fair and reasonable construction to be placed on the defendant's instructions.

The fourth instruction was bad for two reasons, first, it starts out with the premise indicating that the plaintiffs had no right to recover if they put their mules in a pasture knowing that the defendant's railroad tracks ran through the pasture unenclosed; and second, with the idea that the defendant's employees owed no duty to the plaintiffs until after their mules were discovered in a place of danger, and if after they were so discovered the said employees then exercised reasonable care to avoid the injury, the defendant is not liable. The fifth instruction also embodies the last idea and is bad for that reason.

In the first place the plaintiffs had as much right to use the pasture for their mules as the defendant did for his train or trains. The plaintiffs and the plaintiff's mules were no more trespassers for using the pasture than the railroad company is in using it for the running and operating of their trains. See *Railroad Company* v. *Patton*, 31 Miss. 156.. The instruction carries with it clearly the idea that the plaintiffs were in fault for pasturing their mules in a pasture where there ran an unenclosed railroad track and it carries with it the further idea especially when coupled with the first instruction that the engineer was under no duty to keep a lookout and that he owed no duty to the plaintiffs relative to the safety of his mules except to refrain from the infliction of wilful and wanton injury after they were seen and discovered on the track.

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The very reverse of this rule as announced by this instruction is the law as we understand it. The plaintiffs were on an equal footing in this pasture with the railroad company; the railroad company as a matter of law had notice and knowledge of the uses to which the pasture was put; that live stock in a pasture traversed by an unenclosed railroad track would, in the nature of things and by the very nature of the live stock and their disposition to go wherever grazing was to be had, probably go on the railroad track. Being chargeable with this common knowledge in the very essence of things, the engineer should have kept and maintained a lookout for stock in this pasture and have run his train with all these things in mind. His duty did not begin after the stock were discovered in a position of peril on the track.

The condition of these mules or other live stock in the pasture is equivalent to and more nearly like that of a railroad employee engaged at work on the railroad track. The engineer may not run his train over and against a section hand and say that he did not keep a lookout and was under no duty to keep such a lookout and that he owed no duty to the section hand until after he saw him in a place of danger. He is bound to run his train with proper regard for bridge gangs and crews and other employees whose duties require them to be on and about the track.

A mule or drove of mules in a pasture has the disposition to go on and be about eating grass either on or off the railroad track and any man is chargeable with this common knowledge. It might just as well be said that the railroad company should fence its track as to say that a man may not use his pasture unless he will separate it from the railroad by a fence.

In other words the duty rests as much on the railroad company to fence its track as it does on the owner or user of the pasture to fence his pasture off

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from the railroad. There is no duty on either to do so. Both are landowners and both have the right to use their property. If an accident occurs neither is to be charged with negligence or fault because he was using his property under such conditions.

It was just as lawful for the plaintiffs to use the pasture as it was for the railroad to use its track, and the defendant is liable for the injury to the plaintiff's mules if the injury can be traced to and shown to be caused by the defendant's negligence, and it was and is negligence and the defendant is guilty of negligence if its employees did not keep a lookout for the mules and do what they could to avoid the injury.

We submit that if we are mistaken as to the palpable mistake of the jury in returning a verdict for the defendant, then the testimony of the plaintiffs and the defendant can at least be regarded as close, and in a close case with the erroneous instructions given for the defendant that were given in this case the plaintiffs did not and could not get a fair show and they did not have an equal opportunity before the jury. Why, the judge was so far from his poise, and the counsel for the defendant were so overwrought, that the rule of comparative negligence was invoked and applied to the mule. We submit that the mule was not given a fair chance by the railroad employees for his life and that his owners did not get their claim for compensation fairly presented to the jury and that a new trial ought to be ordered.

Brady & Dean, for appellee.

As a matter of fact, under the well-settled law in this state applicable to stock killed by a running train, the appellee here was entitled to a peremptory instruction at the conclusion of all the testimony, and had the verdict of the jury been other than what it was, this

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court would have reversed the judgment rendered thereon.

Witness Fender's testimony was vague and the most that it could do was to inject enough suspicion in the case to make it proper for the court to require appellee to introduce proof. In other words, in the entire absence of any testimony to the contrary it may be conceded that appellee would be thereby charged not with negligence direct, but with the burden of the *prima-facie* statute, and be required to explain the injury of an animal.

His testimony is that he heard and saw a train running slowly, saw several mules scattering from in front of it (not running down the track for seventy-five yards in front of it, as appellant say), next morning found an injured mule south of the track leading to the rails, where there was blood. It would be a stretch to impute even *prima-facie* negligence to this testimony, but the courts have been lenient towards plaintiffs in bridging such gaps and probably would be in this case.

Then the train crew was brought in to testify and their clear, reasonable, undisputed testimony thoroughly and fully absolves the defendant and appellee from any liability of any sort. There is no necessary conflict between their testimony, the testimony of Mr. Fender and the mule tracks down the railroad.

They testified that the train was in good condition, all the testimony shows that it was running rather slowly, the fireman saw three of four mules dash toward the track to get across in front of the engine, only one made it across going from south to north; this one was not seen by the engineer until it crossed from in front of the engine; he immediately shut off and applied the brakes, but the fireman yelled, the mules were gone and he "opened up" again.

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Plaintiff's and appellant's original theory of the case was that the mule which crossed was struck by the train; this does not comport with an injured mule found on the south side of the track, with his tracks leading directly back to the rails, and with the testimony in addition to the well known propensities of the animal, that the mules frequently raced over the pasture and up the tracks.

We repeat, that it was proper for the trial judge to have granted appellee the permptory instruction askd for by it. See: *C. St. L. & N. O. R. R. Co.* v. *Packwood,* 59 Miss. 280; *N. O. & N. E. R. R. Co.* v. *Jones,* 3 So. 653; *K. C. M. & H. R. R. Co.* v. *Myers,* 7 So. 321; *Y. & M. V. R. R. Co.* v. *Smith,* 8 So. 508; *K. C. M. & B. R. R. Co.* v. *Deaton,* 9 So. 828; *L. N. O. & T. Ry. Co.* v. *Tate,* 12 So. 333; *Y. & M. V. R. R. Co.* v. *Wright,* 28 So. 806; *Southern Railway Co.* v. *Murry,* 39 So. 478; *Beasley* v. *N. O. & N. E. R. R. Co.* 45 So. 864.

Out of this list of citations we call attention particularly to the cases of *Ry Company* v *Tate,* 12 So. 333, and *Railway Company* v. *Murry,* 39 So. 478.

The second issue would be whether appellee, through its operating employees, was guilty of negligence in injurying the mule. Appellee's first instruction is entitled to the comment that the trial judge is fond of making: "It is like the old woman's cat; it can't do any good and it can't do any harm." As a matter of fact, it correctly states the engineer's duty, as we understand it, toward stock outside of municipalities and away from road crossings. The same idea in a different form is contained in the fourth instruction, and the same citations will apply.

That is to say: toward its passengers railroads are held to high degree of care." (*V. & J. R. R. Co.* v. *Patton,* 31 Miss. 156.) But both animals and human beings not on a train are required to exercise

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care of their own, and a different rule obtains. It may be admitted that animals straying from an inclosure and wandering onto railroad tracks, or breaking into inclosed tracks are technically guilty of greater trespass than animals crossing tracks which run through an inclosed pasture. In each instance, however, the animals have to do a good deal of looking after themselves, and when discovered in danger the railroad is held to exercise as great prudence in one case as in the other. However, another element enters in when owners knowingly subject their stock to the dangers of running trains, and the law of this state makes that distinction clear.

In *Raiford* v. *M. C. R. R. Company,* 43 Miss. 233, it was said: "Raiford, by letting his horses and stock range in proximate to the railroad, incurred the hazard of their wandering on the road, and the extraordinary risk to which, thereby, they might be exposed. The fact that the animals were on the road did not justify the agents and servants of the company in regarding them there unlawfully and in violation of the rights of the company, and in any measure release the company's servants from the observance of proper care and precaution for their safety. The company had the right to run their trains at a reasonable speed, day and night. We are not prepared to say that the schedule time of running ought, in any degree, to be controlled by the liability of stock to wander into the road, or that the company in determining the rate of speed, should have had any special reference to this liability. The speed of the trains should rather be controlled by the custom of railroads and the exigencies of travel and freights."

In *M. & C. R. R. Company* v. *Blankerey,* 43 Miss. 218, this was re-affirmed. The rule would not be rendered different by the fact that the owner fenced part of his lands—made a pasture but did not fence

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against the railroad. If it is true that this is not required of him, it is also true that it is not required of the railroad, and we have circled back to the statement of the rule.

All that was required of the railroad by law was that where it entered the inclosure it should construct stock-gaps. That had been done in this case. The proof is unusually strong on the fact that appellants knew and appreciated the danger to their stock in placing them in this pasture, but they seem to have proceeded on the assumption that they might as well sell a few head to the railroad as to some buyer. They would have done well to have consulted their attorney rather than Mr. Fender.

In *Beasley* v. *Railroad Company* (*supra*), 45 So. 864, Beasley put seventy head of cattle in a pasture belonging to another person, adjoining the right of way; the railroad had erected a defective fence, through which cattle got and were killed. This was held immaterial, because the fence was not required, and the further facts exonerated the railroad.

In *Y. & M. V. R. R. Co.* v. *Jones,* 71 So. 309, decided in April, 1916, this court through Judge COOK announced a rule already applied to human beings (*Railway Co.* v. *Williams,* 69 Miss. 631): "That there is no obligation on the servants of the company to keep a lookout for trespassing stock."

The first and fourth instructions, therefore, were proper. In themselves they could not and did not mislead the jury. Appellants omit to call attention to the fact that the two instructions asked for by them fully covered the railroad's duties and really overcame the very objections now urged by them to instructions one and four, without in any way conflicting with those instructions.

Justice has been done, and the verdict is manifestly right. *Perry* v. *Clark,* 5 H. 495; *Cartwright* v. *Carpen-*

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ter, 7 H. 328; *Wilson* v. *Kohleim,* 46 Miss. 346 *Shorm* v. *Green,* 51 Miss. 193; *Y. & M. V. R. R.* v. *Martin,* 29 So. 229.

The verdict is fully supported by the testimony, and the instructions given both for the appellee and the appellant state the law sufficiently to enable the jury to apply the same to the facts. *Tush-Ho-Yo-Tubby* v. *Barr,* 45 Miss. 189; *No. & C. R. R. Co.* v. *Field,* 46 Miss. 573; *Insurance Co.* v. *Francis,* 52 Miss. 457; *Chambers* v. *Meaut,* 66 Miss. 625; *Johnson* v. *Walker,* 39 So. 49.

In conclusion, appellee charges that appellants have had more than a fair trial. That is to say, they actually did not make out a case entitling them to go to the jury, and would have had no just cause of complaint before this court had a peremptory instruction been granted to the appellee, as was justified. They did, however, go to the jury which had a fair and full opportunity of passing judgment, and did so adversely to them.

We submit that this court should affirm the judgment of the lower court.

ETHRIDGE, J., delivered the opinion of the court.

Appellants brought suit against appellee for injury to a mule, resulting in the necessity of killing the mule, making it a total loss to the plaintiffs; the suit being for two hundred and seventy-five dollars. It appeared that the appellants were a firm dealing in mules, and they turned a drove of mules, including the one injured, into the pasture of one Fender; a track of the Mississippi Central Railroad Company running through this pasture. The mule was injured at night, and Mr. Fender was introduced as a witness for the plaintiffs, and testified that he saw the train and the mules on the evening in question; that, the mules were running

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down the railroad track, some being on the track and some lower than the track on the other side; that the mules ran some distance ahead of the train, and no effort was made to stop the train, or to blow the whistle or sound the alarm. It appeared that the track through the pasture was straight, and the mules could have been seen by the engineer if he had kept a lookout. It also appeared from the evidence that there were mule tracks along the railroad track for some distance, and that the mule in question was found injured in such manner as to indicate that it was struck by the train. The engineer and fireman testified for the appellee, and said that there were no mules upon the track; the engineer saying that he was on the lookout, that his train was equipped with an electric headlight by which he could see down the track from a quarter to a half mile, and that there were no mules on the track. He said that the fireman called to him that they were about to run into some stock, and that he started to slacken his speed, when the mule turned from the track, and he again turned the steam to his engine. The fireman testified that he saw a mule approach the track as though he was going to the track, but that the mule turned and did not go upon the track. There was direct conflict between the testimony of plaintiffs and that of defendant as to whether the mule was upon the track. In this state of the testimony the court granted to the defendant the following instructions:

"The court insturcts the jury, for the defendant, that defendant's engineer was not required by law to keep a lookout for stock at the place where the mule is alleged to have been struck, and the engineer was required only to exercise reasonable care and diligence to prevent striking the mule after seeing him on the track in a position of danger, and, if the engineer so acted, then your verdict will be for the defendant."

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"The court instructs the jury, for the defendant, that if they believe from the evidence in this case that the plaintiffs put their mule into a pasture through which the defendant's uninclosed tracks passed, then the defendant owed them no duty other than to use reasonable care and caution not to injure plaintiffs' mule, and if they further believe from the evidence that the defendant's agents, after seeing plaintiffs' mule in a place of danger, used reasonable care and caution to prevent striking the mule, then the verdict will be for the defendant, although they may believe that the mule was struck and killed on account thereof."

We think it was reversible error to grant these instructions. The mule was injured in an inclosed pasture, and there is nothing in the record to show that the mule was a trespasser upon the track. This court has repeatedly held that live stock running at large were not trespassers in this state, and that the common law of England was not applicable to this state in so far as it held stock running at large were trespassers.

In *N. O., & G. N. Railroad* v. *Field,* 46 Miss. 573, it was held by the court that owners of cattle may permit them to run at large and to pasture upon uninclosed lands, whether of railroad companies or other owners, and do not thereby incur any responsibility as trespassers. The owner of cattle cannot be held as a trespasser for his cattle entering a close, unless they have broken a fence deemed in law sufficient to exclude them. It was likewise held that the railroad company was not bound to fence a track, but that they would be considered as proprietors of property using it for their private gain, but not to be permitted to so use it as to harm or injure others unnecessarily, if to be avoided. The doctrine of reasonable prudence in the operation of its train and the selection of its employees was laid down as the test of the duty on the part of the railroad company. See, also, *Newman* v. *V. & M.*

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Railroad, 64 Miss. 115, 8 So. 172; *Scott* v. *Railroad,* 72 Miss. 37, 16 So. 205; *Dickerson* v. *Railroad,* 110 Miss. 898, 71 So. 312; *Railroad* v. *Patton,* 31 Miss. 156, 66 Am. Dec. 552; *Railroad* v. *Miller,* 40 Miss. 45; *Railroad* v. *McNeil,* 61 Miss. 434; *Cantrell* v. *Railroad,* 69 Miss. 435, 10 So. 580; *Railroad* v. *Morrison,* 107 Miss. 300, 65 So. 275; *Railroad* v. *Frazier,* 104 Miss. 372, 61 So.547; *Howard* v. *Railroad,* 247, 7 So. 216, 19 Am. St. Rep. 302.

In *Howard* v. *L. N., O. & T. Railway,* 67 Miss. 147, 7 So. 216, 19 Am. Rep. 302, this court recognized the duty of a railroad company to keep a lookout for cattle, but held that this duty was secondary to the duty of the engineer and fireman to properly operate the engine. The court said:

"The engineer and fireman were both engaged at their duties on the engine, and neither saw the animal on the track. While a lookout should be kept when running, it is not want of proper care for the servants of the company to give needed attention to their primary duty, which is the operation of the engine; and the the fact that, for a long time, neither the engineer nor fireman was looking out for animals on the track, did not make the company liable for the death of the animal killed. Upon the undisputed facts, the judgment of the law is that the loss of the mare should fall on her owner rather than upon the railroad company, and, as there was nothing to be found by a jury, the court rightly instructed for the defendant."

In a case note to *Harris* v. *M., K. & T. Railway,* 24 L. R. A. (N. S.) 858, it is said: "By the great weight of authority it is held to be the duty of those in charge of locomotives to keep a lookout for live stock on or near the track in order that they may prevent injury thereto; the care required in doing so being a reasonable ordinary care."

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In the case before us the engineer was not engaged in other duties, and it was error to give the instruction above referred to. A different case would be presented in the case of cattle at large in a stock law district, and a different rule would apply. The mule injured in this case was not a trespasser upon the tracks within the legal meaning of that term.

The court also gave, for the defendant, the following instruction:

"The court instructs the jury, for the defendant, that although they may believe from the evidence that the defendant was negligent, still if they further believe from the evidence that the acts of the plaintiffs' mule in running in front of the defendant's train contributed to the injury to plaintiffs' mule, then they may believe the plaintiffs are entitled to recover, if any, in proportion to the injury caused by all of the mules running before the defendant's locomotive.

Inasmuch as the verdict was for the defendant, the giving of this instruction would not be reversible error; but inasmuch as the cause must be sent back for a new trial, this instruction should not be given. The comparative negligence statute has no application to injury of personal property.

Reversed and remanded.

BRICKELL v. HENDRICKS.

[83 South. 609, In Banc. No. 2958.]

EXECUTOR AND ADMINISTRATOR. *Instrument assuming debt of servant not invalid for want of consideration.*

A decedent has a perfect right to direct the disposition of his estate, and a written assumption of a debt of a servant in con-

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sideration of faithful service rendered and "other valuable consideration" supported by affidavit of correctness on filing the instrument as a claim against the estate of the promisor cannot be defeated on the ground of want of consideration.

APPEAL from the chancery court of Yazoo county. HON. LAMAR EASTERLING, Chancellor.

Proceeding by Rachel Hendricks to compel H. H. Brickell, administrator, to complete payment on claim probated against the estate of J. F. Powell. From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

E. L. Brown and *J. G. Holmes,* for appellant.

The promise was not, by any hint of the record, in consideration of any debt due Rachel by Mr. Powell, but the plain fact is that he was moved to make it as an appreciation of "faithfulness," as a reward for merit, not due under any contract, expressed or implied.

In *Bell* v. *Oates, supra,* Judge ANDERSON stated the facts thus: "The testimony offered on behalf of the appellee tends to establish the following facts, which for the purpose of this decision are taken as true, that the decedent, Miss Moore, and her cousin, Miss Ellison, both of whom were somewhat advanced in years, lived together, Miss Ellison owning the home and the land on which they lived, and Miss Moore being possessed of some money; that five or six years before the death of Miss Moore, which took place in 1908, the appellee, Oates, an unmarriel man, lived with them, under a contract by which these ladies gave him lodging and board and from eight to twelve acres of land to work, in consideration of his looking after their affairs about the place, providing fuel for fires, calling the doctor when necessary, etc., that for a period of from twelve to fifteen months before the

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death of Miss Moore she was feeble, and confined to her bed a good portion of the time, and about six weeks before her death fell and broke her limb, and from that time until her death was very ill, and died from the effects of the injury; that during the last twelve or fifteen months of her life the appellee, in addition to the services he had theretofore performed, waited on her in her sickness and did what was necessary for her comfort; that about six months before her death, Miss Moore stated, while appellee was performing a necessary service for her on account of her sickness: 'I am sorry Oliver (referring to appellee) has this to do, and he is a young man, but we can't do any better. We can't get another living soul, and I will see that he is paid.'

On behalf of the estate it was shown by the witness Shilling, whose testimony is undisputed, that he had attended to the business affairs of Misses Moore and Ellison for many years before the death of the former; that, acting for them, he hired the appellee, in consideration of his lodging and board, and land to work, to be furnished him by them, "to stay there and take care of them, and in case of sickness they would have him to go after the doctor, and see after everything about the place, and wait on them."

The facts, stated by the record in this case, are in every substantial detail as in this, as to the nature of the service, and the nature of the contract, and the court said: "Where a contract is shown, as in this case, by the terms of which the services to be rendered, and the compensation therefor, are fixed, and the claim is for additional compensation for services not contemplated by the contract, loose declarations of the decedent to a third person, expressing a willingness to pay the claimant for services then being rendered by him, are insufficient to establish, either that such services were not contemplated by the contract, or an

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agreement to pay extra therefor. Appellee, under the contract was bound to render the very service he is making claim for; and, had it been shown that decedent expressly agreed to pay therefor an amount additional to that provided in the contract, such agreement would not be binding on her estate, because without consideration. Reversed and decree here for appellant."

Appellee, under her contract, was bound to render the very service rendered, for Alice says that soon after she went there, she was given a raise in salary; and, "had it been shown (or it being shown) that the decedent expressly agreed to pay therefor an amount additional to that provided in the contract, such agreement would not have been binding on her estate, because without consideration."

It is respectfully submitted that the decree should be reversed, and decree here entered dismissing the bill. Respectfully submitted.

Barnett & Perrin, for appellee.

The case was tried and decided on the record which appears in this court. Nothing has been added to or subtracted from it and we submit that upon this record the case should be affirmed for two main reasons.

First: That it appears from said record that the instrument was based upon a good and valuable consideration.

Second: That the chancellor found that it was based upon a good and valuable consideration, and there is evidence to sustain this finding, and this court, under such circumstances will not reverse.

First: On its face the instrument is a perfectly legal one. "Faithful service rendered me for a long term of years" in and of itself, is not only a good, but a valuable and legal consideration, to say nothing

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of the "other valuable consideration recited in the instrument."

The maker of this instrument being dead its execution not called in question, and the mouth of the beneficiary thereof being closed, we submit that its mere introduction as evidence made a *prima-facie* case. It is admitted, in fact the instrument itself recites, that appellee had been in the service of the testator for long term of years, and there is absolutely no proof to show that for such service she had ever been paid one cent, either by the testator or the administrator, except the sum of fifteen dollars, and which was specifically paid for the month of September, 1909 and after the date of said instrument. If such is the case, and it was peculiarly in the power of the administrator to show what payment, if any, had been made the complainant for services rendered in the lifetime of the testator, there can be no doubt but that the instrument was based on a good and valuable consideration. This, it seems to us, is an end of the controversy in this matter, and the ingenious, though rather technical argument of counsel for the appellant, that it was a mere gratuity, is based upon an assumption without any evidence to support it. If appellant had shown that complainant had been compensated for all past services, there might have been some ground for assuming that this instrument was gratuitously executed, but no such evidence appears anywhere in the record.

If presumptions are to prevail in the decision of this case, we submit that they are all in favor of the appellee. In the first place it is a legal presumption that the instrument, solemnly made by the testator in his lifetime, is legal rather than illegal; that, the testator would not knowingly impose upon his faithful servant, by executing and delivering to her an illegal instrument—one based, if you please, as counsel contend, upon no consideration, and therefore illegal. This

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instrument certainly was executed for some purpose, and being in plain and unambiguous language, it is not unreasonabble to presume that it means what it says, viz; that it was "in consideration of faithful service rendered;" not services for which his servant had already been compensated, but services for which the maker of the instrument still owed.

In this respect, the case is readily distinguished from that of *Bell* v. *Oates,* 53 So. 491, relied on entirely by counsel for appellant. In that case the contract for service was made by some one other than the intestate, who testified that it was specified and to cover all services rendered, in the present case the testimony as to the terms of the contract of service is very general and vague, but Mr. Powell made his own contract with the appellee, and is presumed to know what it covered, and whether he had paid for the same; and knowing these facts, he executes this instrument, assuming and undertaking to pay the indebtedness owing by his servant, thus putting a construction upon the contract of service, entirely contrary to that contended for by his administrator, who doesn't pretend to know anything about it.

The decision in the *Bell* v. *Oates,* case was, first, that the complainant had not established by sufficient evidence, that the intestate had made the contract sued on; and second, even if he could establish the promise of the intestate to remunerate him for the services claimed, that, under the undisputed contract made with Schilling, such services were covered. Only Powell and the appellee knew the terms of the contract between them. Powell's mouth is closed by death, appellee's by the law; but before his death, Powell solemnly admits in writing by the instrument here called in question, that he is indebted to appellee for such services. The lower court so finds, and in so doing we think it was eminently correct.

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As bearing directly upon the question here involved we call the court's attention to the following cases: *Berthe* v. *Succession of Lacroix,* 29 Am. Rep. 330; *Wolford* v. *Powers,* 44 Am. Rep. 26. The case of *Wolford* v. *Powers,* is a very full discussion of the whole question of consideration and from it we quote as follows: "Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed unless indeed there is evidence of fraud."

"No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy." *Wolford* v. *Powers,* 44 Am. Rep. 24.

Second: Outside of the instrument itself, which we have contended above shows on its face a valuable consideration, with no testimony to disparage it, we submit that there is evidence in the record upon which the chancellor could find that the said instrument was based upon a valuable consideration, and this being true, the court will not reverse.

Aside from this it is a rule that where one incurs liability, even on the verbal promise of another to assist in the payment of the same, that such promise is based upon a valuable consideration. *Scott* v. *Osburn,* 2 Muf. Va. 413; *Berry* v. *Grady,* 1 Metc. Ky. 383; *Meachum* v. *McKie,* 1 Hil. So. Ca. 374.

On the whole we submit that this is a just liability against the estate of J. F. Powell, and that the decree of the chancery court should be affirmed.

Campbell & Campbell, Robt B. Mayes and *Clayton D. Potter,* for appellee.

We contend that if there ever was a contract based upon a valuable consideration, the instrument litigated

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in this case presents one. The consideration for this agreement was of the very highest character. It was more valuable than money because it consisted in ministering to an old man, in the last days of his life, when there seemed to be no one left but this servant to do it. Services which she performed for him could not be paid for in money for it is too valuable; more valuable than money itself. It was manifestly the intention of the deceased to compensate this servant for her faithful service, and we contend that the greed of those of his heirs who undertake to resist the payment of this debt, should not be allowed to thwart the intention of the owner of this property in carrying out an obligation which he was bound to discharge by every legal and moral consideration.

There is no merit in the consideration of the appellants and they should not be allowed to take away from this faithful servant her just reward for faithful attentions for more than twenty years and at a time when those who would now take the money would not, or did not, volunteer to come forward and relieve the sufferings of this invalided old man in his last years.

The only case that counsel for appellant rely upon is the case of *Bell* v. *Oates*, 97 Miss. 790, now the Oates case and the case on trial are vastly different as we will undertake to show; the opening sentence in counsel's brief shows that these two cases are not at all alike, counsel says in the beginning of his brief that the sole question in this instant case is "whether or not there is a consideration to uphold the promise probated and sued upon."

In the instance case the promise is admitted, and counsel says without consideration; in the Oates case it is shown that Oates lay quiet for years and then undertook to probate a claim against Miss Moore's estate for three years back.

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Before the probation of this claim there had never been any hint that any such claim was thought of by Oates, or recognized or dreamed of by Miss Moore. In addition to this, there was testimony in the Oates case positive and unequivocal, refuting the claim of Oates. On behalf of the estate, one Shilling, in the Oates case positively testified as follows, see 97 Miss. 792, viz, "On behalf of the estate it was shown by the witness, Shilling, whose testimony is undisputed, that he had attended to the business affairs of Misses Moore and Ellison for many years before the death of the former; that acting for them he hired Oates in consideration of his lodging and board and land to work to be furnished by them, to stay there and take care of them, and in case of sickness they would have him go after the doctor, and see after everything about the place, and wait on them."

Now the record in the Oates case shows that there was evidence showing that Oates was paid for the very service that he attempted to claim compensation for in the probated claim. There is no such evidence in this case.

In the Oates case the contract for the compensation was disputed, and was propounded under suspicious circumstances indicating fraud. In the instant case the party to be bound says in writing: "In consideration of faithful services rendered me for a long period of years, etc." The party making this statement best knew about this. Now the only ground it is sought to defeat this contract on is that no consideration supports it. Who best knew about this?

Not a witness testifies that the faithful services were not rendered, and the record shows very conclusively that the most valuable kind of service was rendered. There is no testimony in this case to show that this appellee was bound to render the very service that the decedent to pay her for, but if there was, he had a

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right to make this contract in order to keep her in this service, and to induce greater exertion. The instant case and the Oates case are not at all similar.

If the court needs any further authority on this subject we call attention to the following: *Barthe* v. *Succession of Lacroix,* 29 American Reports, page 330. This is a Louisiana case and is reported in Volume 29 La. Ann. 326.

On page 332 of American Reports, Volume 29, the supreme court of Louisiana says: "We have read all the evidence in this case carefully and the conclusion we have reached is that the deceased Lacroix being without family and believing that plaintiff had served him long and faithfully at very small wages, felt that he was under a moral obligation to remunerate him beyond his wages and executed this five hundred dollar note for that purpose."

This was a case where Lacroix executed a note to Barthe, a clerk in his employ of long standing, for five hundred dollars payable at the death of Lacroix. There was testimony of several witnesses and the court reached the above conclusion that the note was given because Lacroix thought he had paid Barthe very small wages and that he was under moral obligation to remunerate him beyond his wages and executed the five hundred dollar note for that purpose. The court says: "We think that there was a good and valuable consideration for the note." This case, we think, fully answers the argument of appellant that there is no consideration for the obligation of Powell, and we ask the court's careful perusal of same.

We also cite the court to the following authority: *Wolford* v. *Powers,* 85 Ind. 294, also 44 American Reports, page 16.

We earnestly insist that every legal and moral consideration weighs for an affirmance of this case.

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COOK, J., delivered the opinion of the court.

The appellee probated the following instrument as a claim against the estate of J. F. Powell, deceased, viz:

"In consideration of faithful service rendered me for a long term of years by my servant, Rachel Hendricks, and other valuable consideration, I, J. F. Powell, do hereby agree and assume to pay the notes of said Rachel Hendricks to Mrs. Mary R. Miles, secured by a deed of trust on the property of said Rachel Hendricks; the first of said notes being for three hundred fifty-seven dollars, and due and payable March 8, 1910; the second of said notes being for two hundred ninety-seven, due and payable March 8, 1911.

"Witness my hand this 25th day of August, 1909.

J. F. POWELL.

"State of Mississippi, Yazoo County:

"Personally appeared before me, S. S. Griffin, clerk of the chancery court of said county, Rachel Hendricks, who made oath that the annexed claim is just, correct, and owing from the deceased, J. F. Powell, that it is not usurious, and that neither that the affiant nor any other person has received payment in whole or in part thereof, except $——— credited thereon, and that security has not been received therefor, except ———.

RACHEL HENDRICKS.

"Sworn to and subscribed before me this 29th day of Oct., A. D. 1909.

"S. S. GRIFFIN, Clerk,

"[Seal.] By LEE GIBBS, D. C.

"Probated and allowed for six hundred fifty-four dollars and registered, this 29th day of Oct., A. D. 1909.

"Register of Claims, Book A, page 594.

"S. S. GRIFFIN, Clerk,

"By LEE GIBBS, D. C."

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The record discloses that the original executor made several payments on this claim, but after his resignation, his successor declined to pay the balance due and proceedings were begun in the chancery court of Yazoo county to enforce the payment of the balance due. A decree was entered granting the relief sought and the administrator appeals.

The case of *Bell* v. *Oates,* 97 Miss. 790, 53 So. 491 is relied on for a reversal of the decree of the chancellor. As we view the evidence in this case, an entirely different case was made from the case referred to, *Bell* v. *Oates, supra.* The opinion in that case thus sums up the case under review:

"Where a contract is shown, as in this case, by the terms of which the services to be rendered, and the compensation therefor, are fixed, and the claim is for additional compensation for services not contemplated by the contract, loose declarations of the decedent to a third person, expressing a willingness to pay the claimant for services then being rendered by him, are insufficient to establish, either that such services were not contemplated by the contract, or an agreement to pay extra therefor. Appellee, under the contract, was bound to render the very services he is making claim for; and, had it been shown that decedent expressly agreed to pay therefor an amount additional to that provided in the contract, such agreement would not be binding on her estate, because without consideration."

Here we have a written obligation, which is unambiguous, and not only expresses appreciation of the past services of appellant already rendered, but also acknowledges the receipt of other valuable considerations. The deceased had a perfect right to direct the disposition of his estate, and we think the disallowance of this claim would defeat the purposes of the testator.

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We quote with approval from the case of *Wolford* v. *Powers,* reported in 85 Ind., 303, 44 Am. St. Rep. 24:

"Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and in doing this makes a new contract.

"Where the purpose of the party is to secure a pecuniary or property benefit, there is much more ground for judicial interference than in a case like this, where the controlling purpose is not gain, but the gratification of desire or fancy. Even in the former class of cases, courts never do interfere upon the sole ground of inadequacy of consideration, and certainly should not in the class to which the one at bar belongs. No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it, or a conjectural estimate, made arbitrarily and without the semblance of a guide, must be substituted by the courts."

Affirmed.

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UNITED STATES FIDELITY & GUARANTY CO. v. STATE TO USE OF HARDY.

[83 South. 610, In Banc. No. 20954.]

INTOXICATING LIQUORS. *Damages allowed for mental suffering caused by illegal search and seizure.*

Where plaintiff when alighting from a train, intrusted her suit case to a transfer man and just after alighting, the city marshal searched the suit case for alcoholic liquors supposed to belong to the transfer man over his protest and without a search-warrant, in such case the defendant marshal was violating Constitution 1890, section 23, relating to unreasonable search and seizure and since he was presumed to know the law, his act was a willful wrong and mental suffering was a proper element of damages.

APPEAL from the circuit court of Copiah county.

HON. D. M. MILLER, Judge.

Suit by the state of Mississippi for the use Mrs. Lola D. Hardy against the United States Fidelity & Guaranty Company and another. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

H. J. Wilson, for appellant.

Appellants agree with counsel for appellee that damages for mental pain and suffering are actual damages, as so ably contended in their brief, but earnestly insist that such damages even though actual, are sot recoverable where disconnected from physical pain and suffering and not result of a wilful wrong, again calling attention of the court to the authorities on this point cited in our first brief.

The greater part of appellee's brief is taken up in an effort to convince this honorable court that Furr

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acted wilfully and maliciously in searching Mrs. Hardy's suit case. The contention of appellants was that the jury is the sole judge of whether or not Furr committed a wilful wrong. *Chicago, etc., R. R. Co.* v. *Scurr*, 5 Miss. 456; *Wilson* v. *Railroad Co.*, 63 Miss. 352.

It was certainly reversible error for the court below to determine this question and grant an instruction which, in effect, directed the jury to assess appellants with damages for all mental suffering sustained by the appellee, regardless of whether the same were the result of the defendant's acts, and regardless of whether or not Furr's act was willful.

The appellee was a young lady who broke down and cried before the jury while being cross-examined. While this is not in the record, we are sure that if the court will only read between the lines of Mrs. Hardy's cross-examination, it will be able to determine where the sobbing began and ended. Under such circumstances, it was easy for appellee to gain the sympathy of the jury and they would have been prone to grant her excessive damages under proper instructions and under an instruction directing them to return a verdict for damages for mental suffering without requiring them to determine whether such suffering was the result of a willful wrong, and the jury would have returned the same verdict that was returned here.

As a matter of fact, we do not think the court determined whether Furr committed a wilful wrong or not, but think the court granted this instruction through error in the law or some other mistake, for the testimony clearly shows that Furr thought he was only attempting to carry out his duty as marshal of the city of Wesson to protect the people from criminals and had no idea whatever that this suitcase belonged to Mrs. Hardy, or to anyone except Coker. Furr did not stop Coker on his own initiative, but was obeying instructions of the Mayor of the city of Wesson.

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We submit that the whole testimony shows that Furr had no wrongful intentions whatever in searching this suit case, and that instead of intending to violate the law, he was attempting to perform his duty and prevent violations of law, and the testimony further shows that this was the version of this incident that was circulated in Wesson.

We submit that there is no contradiction in the testimony about Mr. Furr having acted wilfully. All the testimony, even that for the appellee, clearly shows that this was an honest mistake, and that the instruction given was erroneous on its face, for the court determines whether or not there is any evidence showing wilfulness. But even if the court thought there was a conflict in the evidence, this should have been submitted to the jury under proper instructions.

We call the attention of the court to a recently decided case of *Monette* v. *Toney,* 119 Miss. 846, which we think decides the question here involved favorably to appellants.

The instruction which the court below refused in that case and the supreme court held to be correct is very similar to instructions asked by appellant below and refused.

M. S. McNeil and *Roberts & Hallam,* for appellee.

It cannot be controverted that the peremptory instruction to find for the plaintiff given by the court below was eminently proper. The appellee's private and constitutional rights had been shamefully violated, and the defendants did not deny it, their only attempt being to minimize the enormity of the wrong. Where the wrong is not denied, but admitted, it is not only the right but the absolute duty of the court trying the case to peremptorily instruct for the party injured. We deem it unnecessary to cite authority.

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The next proposition advanced by appellants is that damages for mental suffering are not recoverable under the facts. We have shown that the wrong committed was perpetrated without a search warrant or any sort of legal authority, and after notice given that the suit case belonged to a lady, as would be proved if Furr would only consent to wait a moment. But "clothed with a little brief authority" as he thought, Furr disregarded the warning and proceeded to search the suit case, and, even after having ocular evidence that the suit case belonged to a lady from the nature of the clothes it contained and without taking time to examine the outside of the case where he would have found the lady's name and address printed, proceeded "to raise them (the clothes) up and felt over them and mashed on them." We say his act was wilful; but if not wilful, he was so grossly negligent in searching this suit case without investigating as to it ownership, and without heeding the warning and notice given him by the party in possession of it, as that his act evinced a reckless disregard of the rights of the appellee to such an extent that it amounted to willfulness, and such is the law.

With this fact established, all of the cases cited by appellants, recognized the right of the appellee to recover damages for mental anguish as actual damages. The whole evidence and every part of it shows that the searching of the suit case in question manifested on the part of Furr a don't-give-a-darn-who-it-belongs-to spirit. If it had belonged to Coker, without a warrant and under protest as it was, the search would have constituted a wilful violation of the law and of his rights. And when Furr was told that it did not belong to him, but to a lady, the act constituted a wilful and contemptuous disregard of the rights of the person to whom it did belong, whoever that person might be. The appellant concedes that if the act was

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wilful, damages for mental suffering are recoverable as compensation for the wrong.

"Damages for mental pain and suffering, shame or mortification. Surely these injuries were real ones, and compensation for these would have been an award for actual damages." *Hewlett* v. *Ragsdale,* 68 Miss. 710.

"Wounding of a man's feelings is as much actual damages as breaking his limbs. The difference is that the one is internal and the other external, one mental and the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last, the amount is indefinite . . . At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings. *Head* v. *G. P. Ry. Co.,* 79 Ga. 358, 360, 7 S. E. 217, 11 A. S. R. 434.

For wrongful search, mental anguish is recoverable as actual damages. Note to *Shall* v. *M. P. & S. Ry. Co.,* 50 L. R. A. (N. S.) 1151. Sec. 23 of the Mississippi constitution reads as follows: "The people shall be secure in their persons, houses and possessions from unreasonable search or seizure; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized." As that mental anguish for a wilful violation of this constitutional provision under all the authorities is recoverable as actual damages.

Punitive and exemplary damages, even, are recoverable for any wilful disregard of the rights of another. *Telegraph Co.* v. *Watson,* 82 Miss. 102; *C. R. C. R. R.* v. *Scurr,* 59 Miss. 456; *V. & M. R. R. Co.* v. *Scanlan,* 63 Miss. 413; *M. & C. R. R. Co.* v. *Whitfield,* 44 Miss. 490, 491, 492; *W. U. T.Co.* v. *Teague,* 117 Miss. 401, 78 So. 610; *Dickerson* v. *W. U. T. Co.,* 74 So. 779.

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Complaint is made because of the giving of the instruction on mental anguish to be found at the bottom of page 7 of the record on the further ground that the jury was not instructed that the mental suffering must have been the direct and proximate result of the unlawful search; but attention is not called to the fact that in the two instructions preceding this one on the same page of the record the jury were instructed that the damage must have been the result of the search of plaintiff's baggage. When these three instructions are read together, as they must be, it is obvious that there was no error committed by the court below in giving them. Omitting the first eight words in each of the last two instructions of page 7, the three instructions, when read together, are as follows:

"The court instructs the jury for the plaintiff, that the defendant acted without legal authority in searching the baggage of this plaintiff and is responsible to her for whatever damages she may have sustained as a result thereof; that it is the sworn duty of the jury to find for the plaintiff and assess her damages at whatever you may believe from the evidence she sustained as a result of the defendant seizing and searching her grip in the presence of other persons in the city of Wesson; that in assessing the damages in this case you may consider the mental pain, suffering, shame and mortification of the plaintiff, if you believe from the evidence she sustained any, in estimating her damages."

The effect of these three instructions as thus read together was this; that the jury should find for the plaintiff on the issue of liability, and should assess her damages, including damages for mental suffering if they believe from the evidence she suffered as a result of the unlawful search. There being no dispute about the fact that the unlawful search was done willfully, and in reckless disregard of the plaintiff's rights

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and of the law, there was nothing for the court to do but to instruct that the case was one justifying an award of damages for mental anguish but leaving the question as to whether she suffered any mental anguish and the amount of the award therefor, if they believe she did so suffer, to the determination of the jury. Speaking of unlawful arrests, in 2 Sutherland on Damages, (3 Ed.), 488, it is said:

"If an illegal arrest is made there may be a recovery for mental suffering, although neither fraud nor malice is shown." The same reasoning applies to an illegal search. Every person is presumed to know the law, and if he does an unlawful act, he is held to have acted willfully. Indulging this conclusive presumption that Furr knew the law and that he had no right to search without a warrant, he will be held to have acted willfully and in disregard of the law when he proceeded to search without warrant.

The last of appellant's objections is that the defendant was not responsible for rumors circulated by others than Furr in Wesson and Jackson that the appellee's suit case had been searched for whiskey by the town marshal of Wesson, and that therefore mental suffering of the plaintiff on account of such reports was not a proper element of damages.

The court will observe that the evidence of these reports, and the consequent mental suffering of the plaintiff, was permitted to go to the jury without objection on the part of the defendants. A motion to exclude such evidence was not even made. An objection to the competency of evidence, therefore, not raised in the court below will not be noticed on appeal. *Neely* v. *Planters Bank,* 4 S. & M. 113; *Kaufman* v. *Foster,* 89 Miss. 388, 42 So. 667. And the defect, therefore, in the competency of the evidence was waived. *Fox* v. *Baggett,* 101 Miss. 519, 58 So. 481. Without any other evidence to show mental suffering, the mere fact

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that the appellee knew that her suit case had been searched for whiskey in a public place, in the presence of her transfer man, Varnado, and the negro porter, was sufficient to uphold the meager damages awarded by the jury. The sum of two hundred and fifty dollars is a mere pittance, and in this case amounts to nominal damages only. The verdict shows that the jury did not consider the reports circulated in Wesson and Jackson, and did not take into consideration the mental suffering occasioned the appellee thereby, but only awarded damages for the wrongful search of the suit case in a public place and in the presence of strangers, and the resulting suffering incident to the knowledge thereof. As said in *R. R. Co.* v. *Moore,* 110 Miss. 775:

"If it (the instruction on mental suffering as applied to the reports above mentioned) be error, it is therefore harmless and looking through the entire record, and taking into consideration the amount of the verdict, we cannot say that the instruction is reversible error."

Because of the failure of the appellant to file their brief until the day this case was set for call, and the limited time given the appellee to answer it, we have briefed this case as if the stenographer's notes were still a part of the record. By so doing, however, we are not to be understood as waiving the motion to strike, but we still insist on the motion. Without the stenographer's notes in the records there is nothing for the court to decide, for, in the absence of a bill of exceptions, instructions will not be held erroneous, if, in any conceivable state of facts that might have been in evidence under the issue, they would be correct. *Hartford Fire, etc.* v. *Green,* 52 Miss. 332; *Bowers* v. *Ross,* 55 Miss. 213; *Strickland* v. *Hudson,* 55 Miss. 235; *Kellum* v. *State,* 64 Miss. 226, 1 So. 174; *Covel* v. *Smith,* 68 Miss. 296, 8 So. 859; *Christ-*

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man v. *Russell*, 73 Miss. 452, 18 So. 656.

The judgment of the lower court was, we submit, right, and should be affirmed.

Cook, J., delivered the opinion of the court.

The appellee, Mrs. Hardy, a resident of Jackson, in this state, took passage on a train for Wesson. The trip was undertaken to visit her parents. When she alighted from the train at Wesson, she intrusted her suit case to the transfer man, Mr. Coker. It seems that the officer of Wesson had suspected that Coker was engaged in the business of bringing into Wesson alcoholic liquors and selling same in violation of the ordinances of the town and the laws of the state.

The mayor of the town, it seems, had told the defendant Furr, who was the marshal of the town, that Coker had gone somewhere for whiskey, and that the marshal should be on the watch, and, if Coker came in with a grip, the marshal should be sure to search it. No search warrant, or any other legal writ, was issued and delivered to the marshal. When the train reached Wesson, Coker came from the train with a suit case which he was carrying for Mrs. Hardy; he carried it into the baggage room and put it down on the floor, whereupon the defendant Furr proceeded to open the same and disarrange its contents. This was done over the protests of Coker.

The news spread that Mrs. Hardy's suit case had been searched by the officers of the law looking for whiskey. Naturally, a woman of refinement would suffer humiliation from this unwarranted and illegal act, and naturally, in a town of the size of Wesson, in a few hours the entire story was in the possession of the population, and the alleged facts, and all the inferences drawn therefrom, were analyzed and probably magnified.

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It is insisted that instruction No. 4 should not have been given, and that the giving of that instruction was reversible error. The instruction is in these words:

"The court instructs the jury, for the plaintiff, that in assessing the damages in this case you may consider the mental pain, suffering, shame, and mortification of the plaintiff, if you believe from the evidence she sustained any, in estimating her damages."

The contentiin is that the marshal was not guilty of any willful wrong when he seized and searched the suit case over the protest of the custodian, and after having been told that the suit case belonged to a lady. The marshal knew, or should have known, that he was doing a willful wrong when he searched the suit case. It will be presumed that he knew the law. Section 23 of the state Constitution is as follows:

"The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."

The policeman ignored the Bill of Rights.

We find no error in this record. We think mental suffering was a proper element of damages under the facts of this case. In the case of *Western Union Tel. Co.* v. *Rogers*, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300, Judge COOPER thoroughly discussed the question we have here before us, holding: "In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party," damages for mental suffering have generally been allowed.

This unlawful and willful act certainly may have seriously affected the character and reputation of the plaintiff in this case.

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POSTAL TELEGRAPH-CABLE CO *v.* THOMPSON.

[83 South. 612, In Banc. No. 20918.]

JUSTICE OF THE PEACE. *Service of summons by deputy of regular constable insufficient.*

Where in a suit before a justice of the peace, it appeared that the summons for the defendant was not executed by the constable, but by a person claiming to act as the constable's deputy and the record contained no evidence of the appointment of such person either as a deputy constable or as a special constable, the service was unauthorized; the presumption that such person was a special constable appointed by the justice under Code 1906, section 2732 (Hemingway's Code, section 2231), not being tenable, since the return of service, clearly showed that the person serving the summons did not claim to be acting as a special constable, but as a deputy of the regular constable.

APPEAL from the circuit court of Franklin county.

HON. R. E. JACKSON, Judge.

Action by C. E. Thompson against the Postal Telegraph-Cable Company. Judgment for plaintiff was rendered by a justice of the peace. The cause was removed by *certiorari* to the circuit court, which after overruling a motion to quash and without reversing the judgment of the justice, ordered the case to be tried on its merits but afterwards rendered final judgment for plaintiff and defendant appeals.

The facts are fully stated in the opinion of the court.

J. N. Flowers and *Ellis B. Cooper,* for appellant.

Counsel says, and his brief assumes, that the justice of the peace appointed someone to serve the summons in that court. But we have been unable to find in the record any appointment of any other person. We ask counsel to show us. That appointment should exist if it ever existed.

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But the record indicates that it was served by a deputy constable and not by a a "reputable person appointed for the emergency." We do not question or criticize his authorities that every presumption is indulged in favor of a record of the justice of the peace court. That presumption is used more than any other known to the law.

But we say that there is no such officer as a deputy constable. None is provided for by statute. The very section appellee cites, fortifies our contention that no such officer exists. What does it say? "In cases of emergency, and where a constable, or sheriff, or deputy sheriff cannot be had in time, the justice of the peace may appoint—"

The absence of "deputy constables" is certainly significant. That there is no such officer follows from a perusal of the chapter of the code on constables. Sections 829 to 836 inclusive. But turn to the chapter of sheriffs and we find section 4664 specifically authorizing deputies. So we have the service of process by an individual who held no authority. It requires no authority to say it is void. And again there can be no claim of a *de facto* officer. Before one can be *de facto* officer there must be an office. So we submit that the service of process was void. The judgment was by default and it is, therefore, void.

Writ of inquiry. We concede the authority of *Welch* v. *Hannie*, 72 So. 861, 112 Miss. 79, because it is the sensible rule. But the judgment in that case duly recited the following: "It was, therefore, on motion of plaintiff, judgment is rendered against defendant by default; and this being an action in tort for damages, the court thereupon issued a writ of inquiry to assess the damages, and the same having been executed, the court having heard the evidence adduced by the plaintiff is of the opinion that said damages should be, and

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the same are hereby, assessed at the sum two hundred dollars. . . . .

In the instant case it reads: "And plointilff being in court and demanding judgment and it appearing that the defendant had been duly and legally served with summons not less than five days before this date, the said defendant being called came not, but wholly made default, and the court having considered this cause, it is therefore ordered and adjudged . . . "

There is no recital showing compliance with the rule in *Welch* v. *Hannie, supra,* and as said in 23 Cyc., page 766: "And, if the statute requires plaintiff to produce or file proof of his cause of action, before the judgment can be entered, it is necessary that the judgment shall show a compliance with the requirement. And if there was an inquiry of damages, the judgment should recite the manner in which the assessment was made." There is no recital except "and the court having considered the cause" counsel would have this court say that this recital is presumptive of everything So on this feature we submit that there was plain error.

Damages. Counsel concedes impliedly that his claim for damages outside of the penalty and expenses, amounting to forty-six dollars is unenforceable.

Thompson & McWhorter, for appellee.

The transcript of the record shows that the original process in this case was served by a deputy constable, and this it is contended by counsel for appellant, renders the judgment void, see page 7, appellant's brief. And counsel states in his brief that "we have been able to find the authority to appoint deputy sheriffs, but we are unable to find any authority for the appointment of a deputy constable." Counsel evidently stopped searching when he had read section "3942 (3443) Persons Appointed by Judge to Execute Process," and did not discover section 2732 of the Code of 1906, which reads as follows: "2732 (2403) Persons

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Appointed to Execute Process, in cases of emergency, and where a constable or sheriff, or deputy sheriff cannot be had in time, the justice of the peace may appoint some reputable person to execute any process, the justice to be liable on his bond for all damages which may result to a party to the cause, or other person, from his appointment of an insolvent or incompetent person."

From this the justice's authority to make such an appointment as he did in this case is plain and unmistakable. The sole question remaining, then, is what should the justice record show, if anything, as to the occasion of the appointment of the deputy. The presumption is that one presuming to act as a justice officer is properly authorized to do so, that an officer has properly performed his official duties and that his official acts are regular. 23 Cyc., page 264. All things are presumed to be regularly done until the contrary is proven. "23 Cyc., 1266."

Not only is a justice conceded to have great powers and authority, but also his proceedings are presumed to be regular until the contrary is clearly shown. There is nothing in this record to show the contrary, therefore, the presumption must prevail and the necesssity or the "emergency" of the appointment and the regularity thereof cannot now be questioned. On this point we cite: *Houston Alfred, et al.* v. *Batson,* 91 Miss. 749, 45 So. 465. In this case the objection was made, as set out in the opinion of the court, that there "was no legal service upon the defendant in the justice of the peace court for the reason that the record shows affirmatively that the said justice of the peace appointed one Wheat, a private person to execute and return the writ, and there is no showing anywhere in the record that it was a case of emergency, and that the constable, or sheriff, or a deputy sheriff, could not be had in time, etc." This objection is identical with

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the one made in the case at bar. But the court, among other things, said: "It has been held that the book styled 'Docket of the Justice of the peace, contains the record of the proceedings of the court, a copy of which he is directed to transmit to the circuit clerk, and a certified transcript of which is required to be recorded, and it is held in the same case that the docket record of the justice of the peace of the issuance and return of process is as much entitled to be accepted as true as would be a copy of the summons, and the return on it certified by him, and the special appointment presumed to be valid. In the proceeding now before us, it must be taken that the special constable was properly appointed." The court, in the case just cited, approved *Hughston* v. *Cornish*, 59 Miss. 372, in which Judge CAMPBELL said: "The acts of justices of the peace within their authorized sphere are entitled to full faith and credit. Their records made according to law, like other records, import verity."

SMITH, C. J., delivered the opinion of the court.

The appellee recovered a judgment by default against the appellant in a court of a justice of the psace and afterwards the cause was removed to the court below by a writ of *certiorari*. The court below overruled a motion to quash the writ of *certiorari*, and without reversing the judgment of the justice of the peace ordered the cause to be tried on its merits, but afterwards rendered final judgment, from which this appeal is taken, as follows:

"This cause coming on to be heard on motion of C. E. Thompson, to enter such judgment as the justice court should have rendered, and the court having duly considered the same, and it appearing to the court that the defendant was duly served with process in justice

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court, and it further appearing to the court that the judgment that ought to have been rendered in the justice court is apparent on the face of the records, it is therefore ordered and adjudged by the court without a jury that the plaintiff, C. E. Thompson, do have and recover of and from the defendant, the Postal Telegraph Company, a corporation, the sum of twenty-five dollars statutory penalty, and the further sum of one hundred and seventy-five dollars, actual damages sustained by plaintiff, together with six per cent interest from January 15, 1918, together with all costs, for which let execution issue."

One of the alleged defects in the judgment of the justice of the peace is that it was rendered without legal srvice of process. The summons for the appellant issued by the justice of the peace was not executed by the constable, but by a person claiming to act as the constable's deputy; the return of service indorsed on the summons being signed: James Ewell, Constble, Boyce Thomas, Deputy Constable." The record contains no evidence of the appointment of Thomas either as a deputy constable or as a special constable.

The statute makes no provision for a deputy constable and the appellee does not claim that it does; his contention being that we must presume that Thomas was a special constable appointed by the justice of the peace to serve the summons under the provisions of section 2732, Code of 1906, section 2231, Hemingway's Code; but a sufficient answer thereto is that the return of service on the summons excludes such a presumption, for it clearly appears therefrom that Thomas did not claim to be acting as a special constable in serving the summons, but as a deputy of the regular constable.

The summons having been served by a person without authority to do so, the appellant was under no obligation to obey it; consequently the justice of the peace

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should not have rendered judgment by default against it. The court below should shave set aside the judgment rendered by the justice of the peace and remanded the cause to him for further proceedings. *McDugle* v. *Filmer,* 79 Miss. 53, 29 So. 996, 89 Am. St. Rep. 582.

Reversed and remanded.

COOK, J., (dissenting).

I find myself unable to agree with the majority. The gist of the opinion may be found in the language of the Chief Justice speaking for the court. He says: "The statute makes no provision for a deputy constable." I think the court is clearly wrong in this statement of the law. The statute is in these words:

"Persons appointed to execute process.—In cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the justice of the peace may appoint some reputable person to execute any process, the justice to be liable on his bond for all damage which may result to a party to the cause or other person from his appointment of an insolvent or incompetent person. Section 2732, Code of 1906, Section 2231, Hemingway's Code.

The majority of the court seem to believe that the Code section provides for a "special constable," but it fails to provide for the appointment of a deputy constable. Nothing in the statute warrants either conclusion. When we take into consinderation that all of the standard dictionaries treat "deputy" and "substitute" as synonymous, it will clearly appear that the statute confers upon the justice of the peace the power to appoint not a special constable, but it does in plain and, in my opinion, unmistakable terms, confer upon the justice of the peace the exclusive power to appoint a deputy or substitute constable, when the emergency exists. A mere reading of the statute will disclose that

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the word "special" does not appear in the law. The word emergency does not appear in the statute, and if I was inclined to be a stickler for precise expressions, I would suggest that the person appointed under the statute should sign as "emergency constable;" but I believe that the person deputized or appointed is a deputy, and also a "deputy constable" appointed by the justice of the peace by the authority of the statute.

When the emergency arises under the statute the justice of the peace is expressly authorizd to appoint a reputable person to execute the process. In other words, the person so appointed is a substitute for or deputy of the elected constable.

Section 2731, Code of 1906, section 2230, Hemingway's Code, admonishes the justice of the peace, if there be a constable in the district qualified to act, the process shall not be directed to the sheriff.

In this case it is fair to assume that there was a constable elected in the district, and that there was a sheriff and deputy sheriffs of the county, but none of these officers could be found in time, and so it was he gave the preference to the constable and deputized the person who returned the writ to serve the writ for and in the place of the constable elect. That would carry out the spirit of the statutes of the state.

So, I think, that the return of the summons was entirely within the law and that the emergency appointee was the deputy of the constable made so by the only authority known to the law, and any other interpretation of the record is too refined and technical for the ordinary affairs of life.

The defendant in this case does not claim it was not served with process, but does claim the return shows that the person serving the process was not authorized by law to serve the same. The trial justice of the peace, of course, knew that he had deputized the very man who returned the writ. So it seems to me, that

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the defendant had legal notice, chose to ignore the service, and resorted to a *certiorari*.

If we ignore as surplusage all of the return on the summons except the name of the appointee and the word "deputy," I submit that the return is beyond criticism. I have been unable to find but one decision of this court which is in any way applicable to the present case. In *Nelson* v. *Nye*, 43 Miss. 126, this court approved a return in principle much like the one in this case. The court in that case said that a substantial compliance with the statute was sufficient, saying that, in the absence of anything to the contrary, the special deputy sheriff was duly authorized to serve the writ. The word "deputize" is thus defined:

"Deputize: To appoint a deputy; to appoint or commission one to act as deputy to an officer. In a general sense the term is descriptive of empowering one person to act for another in any capacity or relation, but in law it is almost always restricted to the substitution of a person appointed to act for an officer of the law." Black's Law Dictionary (2 Ed.), p. 358.

STEVENS J., concurs in the foregoing dissent.

HARRISON COUNTY *v.* ROBERTSON.

[83 South. 617, In Banc. No. 20904.]

1. TAXATION. *State revenue agent may sue for unpaid taxes.*
The state revenue agent has the right "to proceed by suit in the proper court for past due and unpaid taxes of any kind."

2. VOLUNTARY PAYMENT OF TAXES TO TAX COLLECTOR AFTER SUIT BROUGHT BY REVENUE AGENT DOES NOT DEFEAT RIGHT OF AGENT TO COMMISSION.
Voluntary payment of taxes by deliquent taxpayers to the tax collector, instead of to the revenue agent, makes no difference

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in the right of the revenue agent to demand his commissions, provided only that the taxes were paid as a result of a demand and litigation instituted by the revenue agent.

2. STATE REVENUE AGENT SUING FOR DELINQUENT TAXES PENDING APPEAL FROM ASSESSMENT HAS NO RIGHT TO COMMISSIFNS.
Under Code 1906, section 81 (Hemingway's Code, section 61), authorizing appeal from assessments by the board of supervisors, and section 4310, providing that collection of taxes shall not be delayed by appeal, a state revenue agent may not recover commissions for delinquent taxes paid by a bank after suit brought by the agent to compel payment, but before trial, where at the time of such suit an appeal by the bank from the assessment of such tax was pending.

4. ABATEMENT AND REVIVAL. *Identical suit cannot be entertained at the same time.*
Two suits should not be entertained at the same time in the same court between the same parties and involving the same demand.

5. PLEADING. *Plea which states good defense to action good though not strictly a plea in abatement.*
Although a plea is denominated as a plea in abatement, the court will treat it as good on demurrer, if it states facts which defeat the action, though not strictly a plea in abatement.

APPEAL from the circuit court of Harrison county. HON. C. L. RUSHING, Judge.

Suit by Stokes V. Robertson, state revenue agent, against Harrison County. Judgment for plaintiff, and defendant appeals.

The facts are fully stated in the opinion of the court.

R. C. Coman, for appellant.

This is a suit brought by Stokes V. Robertson, revenue agent, against Harrison county, to recover from said Harrison county twenty per cent of the amount of the taxes paid to the state and county by the First National Bank of Gulfport for the year 1916, and alleging that he is entitled to same for the reason that he, as said officail instituted suit against the said First National Bank on the 21st day of June

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1917, to enforce the payment of said taxes, and alleging that said taxes were then delinquent and that the said taxes were paid after said suit was filed and before the convening of the court to which the same was re turnable; the amount of said taxes being five thousand, three hundred, seventy-three dollars and ninety-seven cents, and the twenty per cent. thereof claimed by the revenue agent being one thousand, seventy-four dollars and seventy-nine cents.

A plea in abatement was filed by Harrison county to which plea the plaintiff filed a demurrer. I know of no better way to present the facts to this court than by setting out in full the plea in abatement filed by the defendant in the court below, the truth of which plea is admitted by the demurrer filed therein by the plaintiff, said plea in abatement being as follows: "And the defendant, Harrison county, by its attorneys, comes and defends the action brought against it by the said Stokes V. Robertson, the state revenue agent, and says that before and at the time of the announcement of the said action by the said plaintiff against this defendant, there was pending and still is pending and undisposed of, in this court, a suit by the First National Bank of Gulfport against the board of supervisors of Harrison county, Mississippi, and the state of Mississippi, said suit being No. 6142 on the docket of the said circuit court of Harrison county, Mississippi, wherein the identical subject-matter, to wit; the taxes due Harrison county Mississippi ,and the state of Mississippi by said First National Bank of Gulfport, for the year 1916 in the sum of five thousand, three hundred seventy-three dollars and ninety-seven cents is in controversy, said suit No. 6142 being an appeal by the said First National Bank of Gulfport from the assessment and judgment of the board of supervisors of Harrison county assessing and fixing the amount of

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taxes due and payable by the said First National Bank of Gulfport on its personal property for the year 1916; and that although the said First National Bank of Gulfport did pay and has paid its said taxes for the year 1916, if said First National Bank of Gulfport should be successful in its said suit No. 6142 at the trial thereof, said taxes for the year 1916, paid by said bank would have to be refunded or an adjustment thereof made as should be determined and provided by the judgment of this court in said cause; and that the said taxes for the year 1916 amounting to five thousand, three hundred, seventy-three dollars and ninety-seven cents from the assessment of which by the said board of supervisors of Harrison county the said First National Bank of Gulfport has appealed to this court in cause No. 6142 aforesaid, is the same and identical assessment and taxes upon which plaintiff now seeks to recover twenty per cent thereof; and reference is here made to the file of papers in the said suit No. 6142 and the same is prayed to be considered a part hereof as fully as if copied at length herein or attached hereto; and this the defendant is ready to verify; wherefore the defendant prays judgment of the court that the said action here begun be abated until the trial and final disposition of the aforesaid suit No. 6142.

R. C. Coman for Harrison County.

The First National Bank had a legal right to appeal from the judgment of the board of supervisors assessing its taxes for the year 1916, and after the appeal of the said bank from said assessment was perfected, the bank had a legal right to pay its taxes before a final disposition of the appeal.

Section 4310, Code of 1906 (section 6946, Hemingway's Code) provides that "in event said taxes are

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paid before the final disposition of the appeal, any money improperly collected, as shown by the judgment shall be refunded by the state and county respectively, if they have received the money," and provides how the same shall be refunded" in that event and the tax collector receiving it shall not have paid it over." This section also provides for the refunding by the state and county of the respective amounts improperly collected. Until the appeal of the said First National Bank from the assessment of its taxes for the year 1916 by the board of supervisors was determined, there was no basis upon which to compute the amount of taxes due by the bank, and the parts of the whole due the state or county. Were we to concede that the bank was delinquent in the payment of its taxes for the year 1916 and that the payment of said taxes was brought about by the suit of the revenue agent against said First National Bank for the collection of said taxes, yet, while the appeal of the said First National Bank from its assessment, upon which said taxes were to be collected, was pending, there was no amount fixed by law upon which the compensation of the revenue agent could be computed. Surely the case at bar should have been abated until said appeal by the First National Bank was determined.

Harrison County might have had other defenses to this action of which it could not avail itself at that time. The judgment rendered by the court is against Harrison county only and the amount of same is twenty per cent of the taxes paid by the First National Bank to the state of Mississippi and Harrison county. If the compensation of the revenue agent is a fixed charge of twenty per cent against the amount collected, I fail to see how judgment could be rendered against Harrison county for the full twenty per cent when the court is bound to take judicial knowledge of the fact

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that a substantial part of the taxes paid by the said First National Bank are taxes due the state of Mississippi; again, I say the amount of the taxes to be paid by the bank, and upon which compensation due the revenue agent is to be calculated, could not be determined by the court until the appeal of the said First National Bank from the judgment of the board of supervisors of Harrison county assessing said taxes, was disposed of.

I take it, that the plea in abatement hereinbefore copied in full, the truth of which is admitted by demurrer, is both law and argument enough in this case.

A. J. Ramsey, for appellee.

The facts will disclose that this case is controlled by the case of *T. C. Garrett* v. *Stokes V. Robertson, State Revenue agent,* recently decided by this court but not yet reported.

As to the plea in abatement, the demurrer was properly sustained. Said plea constituted no defense to said action. Said plea does not anywhere state that the First National Bank had a meritorious case against the county nor set out any facts from which a meritorious case could exist nor facts that would bar the revenue agent of his twenty per cent commission; nor does it set out any facts from which the court could determine if said First National Bank had a meritorious case or would be successful. Further, the plea does not state or allege that any attempt had been made or would be made to dispose of said case and the parties were altogether different from the parties in the instant case.

Besides, judgment in this case was rendered on the 25th day of March, 1919, and the case referred to in said plea of abatement, cause 6142, *First National Bank*

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of Gulfport v. *Harrison County,* was dismissed by the plaintiff at its cost two days after the date of judgment in this cause, March 27, 1919, as will appear from a certified copy of the judgment of dismissal of said cause 5142 in said circuit court, which is herewith filed and made a part of this brief, being the same case set out in said plea of abatement. The court will notice that the clerk of the circuit court certifies that said cause was dismissed on March 27, 1919. Aside from this, however, there was absolutely nothing in the plea of abatement and the appellee's demurrer thereto was properly sustained.

STEVENS, J., delivered the opinion of the court.

The county of Harrison, appellant herein, was the defendant in this action, instituted by appellee, the state revenue agent, to recover one thousand, seventy-four dollars and seventy-nine cents, commission alleged to be due the revenue agent upon certain taxes paid by the First National Bank of Gulfport. Appellee, as plaintiff, filed his declaration in the circuit court, averring that the said First National Bank was delinquent for its taxes due for the year 1916 in the sum of five thousand, three hundred seventy-three dollars and ninety-seven cents; that on June 21, 1917, plaintiff had filed suit on behalf of the state and county against said bank for the recovery of said taxes; that said bank as a defendant in the suit was duly served with process, and thereafter, on August 23, 1917, and before the circuit court met, said bank paid its taxes to the sheriff of Harrison county and received a tax collector's receipt therefor, and by virtue of these facts the plaintiff was entitled to his said commissions. Appellee filed the following plea, which it styled a plea in abatement, to wit:

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"And the defendant, Harrison county, by its attorney, comes and defends the action brought against it by the said Stokes V. Robertson, state revenue agent, and says that before and at the time of the commencement of the said action by the said plaintiff against this defendant there was pending, and still is pending and undisposed of, in this court, a suit by the First National Bank of Gulfport against the board of supervisors of Harrison county, Mississippi, the defendant herein, said suit being No. 6142 on the docket of the said circuit court of Harrison county, Mississippi, wherein the identical subject-matter, to wit, the taxes due Harrison county, Mississippi, and the state of Mississippi, by said First National Bank of Gulfport, for the year 1916, in the sum of five thousand, three hundred seventy-three dollars and ninety-seven cents, is in controversy, said suit No. 6142 being an appeal by the said First National Bank of Gulfport from the assessment and judgment of the board of supervisors of Harrison county, assessing and fixing the amount of taxes due and payable by the said First National Bank of Gulfport on its personal property for the year 1916, and that, although the said First National Bank of Gulfport did pay and has paid its said taxes for the year 1916, yet, as provided in section 4310 of the Code of 1906, if said First National Bank of Gulfport should be successful in its said suit No. 6142 at the trial thereof, and taxes for the year 1916, paid by said bank, would have to be refunded, or an adjustment thereof made, as should be determined and provided by the judgment of this court in said cause, and that the said taxes for the year 1916, amounting to five thousand, three hundred seventy-three dollars and ninety-seven cents from the assessment of which by the said board of supervisors of Harrison county the said First National Bank of Gulfport has appealed to this court in cause No. 6142 aforesaid, is the same and identical assessment

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and taxes upon which plaintiff now seeks to recover twenty per cent. thereof, and reference is here made to the file of papers in the said suit No. 6142, and the same is prayed to be considered a part hereof as fully as if copied at length herein or attached hereto, and this the defendant is ready to verify. Wherefore the defendant prays judgment of the court that the said action here begun be abated until the trial and final disposition of the aforesaid suit No. 6142."

To this plea appellee interposed a demurrer submitting: "(1) Said plea is insufficient in law.

"(2) The plaintiff in this suit is not a party to the suit mentioned in the plea. It is shown on face of plea that the parties therein are different from the parties to this suit.

"(3) Said plea states no defense."

The demurrer was sustained, and, the defendant declining to plead further, judgment final was given in favor of the revenue agent for the full amount of his said commissions and all costs, and from this judgment the county appeals.

By section 81, Code of 1906 (section 61, Hemingway's Code), any taxpayer, feeling aggrieved at the assessment by the board of supervisors of his property for taxes, is given the right to appeal to the circuit court—"upon giving bond, with sufficient sureties, in double the amount of the matter in dispute, but never less than one hundred dollars, payable to the state, and conditioned to perform the judgment of the circuit court."

And on appeal "the controversy shall be tried anew in the circuit court at the first term, and be a preference case." The section provides further that, if the taxpayer wins his appeal, judgment shall be entered in his favor and certified to the board of supervisors, and, if he loses his appeal, judgment shall be rendered on the appeal bond for damages at the rate of ten per cent. of the amount in controversy and allcosts.

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By section 4310, Code of 1906 (section 6944, Hemingway's Code), it is expressly provided that this appeal from an assessment shall not delay the collection of taxes due by the approved assessment, but provision is made whereby any money improperly collected from the taxpayer, as shown by the final judgment of the circuit court, is to be refunded to him by the state and county, respectively. It is further provided that, if the moneys are in the hands of the tax collector, the tax collector shall make proper refund, and finally:

"If the case be decided in favor of the party appealing while the collector is proceeding with the collection of taxes he shall conform his action to the judgment."

In determining the propriety of the court's action in sustaining appellee's demurrer to the defendant's plea, we must, as we view it, determine the further and controlling question as to whether the state revenue agent is entitled to any commissions, under the facts set forth in the pleadings. It is unquestionably true that the state revenue agent has the right "to proceed by suit in the proper court for past-due and unpaid taxes of any kind," as stated by Judge SYKES in *Garrott* v. *Robertson,* 83 So. 177.

It is likewise true that the voluntary payment of taxes by delinquent taxpayers to the tax collector, instead of to the revenue agent, makes no difference in the right of the revenue agent to demand his commissions, provided only that the taxes were paid as a result of a demand and litigation instituted by the revenue agent. It must also be conceded that by section 4310, Code of 1906 an appeal by the taxpayer from the approved assessment does not delay the collection of taxes due on the assessment as finally approved by the board of supervisors. *Tunica County* v. *Tate,* 78 Miss. 294, 29 So. 74.

From the conclusions thus far conceded, the persuasive argument is made that the revenue agent had the

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right in this case to sue the First National Bank as a delinquent taxpayer, even though the bank had prosecuted an appeal from the assessment as fixed by the board of supervisors and while this appeal was pending for trial in the circuit court of Harrison county. We believe, however, that there are other and controlling considerations in the case. In the first place, any taxpayer, who is aggrieved at the assessment fixed by the board of supervisors, is by statute expressly given the right of appeal, and this right the First National Bank exercised, as affirmatively shown by the pleadings. In prosecuting this appeal the bank was by statute required to execute a bond in double the amount of taxes involved, and, in event it should lose its appeal, subjected itself to the penalty of ten per cent. and all costs. The bank had the right to a trial *de novo* in the circuit court. There was involved in this appeal, not only the liability of the bank for taxes, but the proper and lawful amount of the assessment. In disposing of such appeal the circuit court would necessarily adjudicate the definite liability of the bank, and ultimately fix the amount of the assessment, and consequently the amount of taxes to be paid. Our statutes thus furnish a statutory provision whereby the courts may review upon their merits the decisions of the assessing officers and boards, and render such judgment as conforms to justice and equality. It is therefore, as between the county and the taxpayer, a suit involving the proper liability for taxes.

What good purpose, therefore, could be accomplished by permitting the state revenue agent, pending the disposition of such appeal, to institute himself another and separate action against the complaining taxpayer for the recovery of taxes, the amount of which must ultimately depend upon the proper amount of the assessment? The right of the revenue agent to prosecute a suit in his own name against a delinquent tax-

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payer always depends upon the assumption that no suit is pending by the proper authority involving the same subject-matter. It is elementary that two suits should not be entertained at the same time, in the same court, between the same parties, and involving the same demand. The fact that the revenue agent was not a direct party to the first proceeding, whereby the First National Bank appealed from its assessment, is not a controlling consideration. Section 81 of the Code furnishes a method whereby an aggrieved taxpayer may himself initiate litigation to determine his ultimate liability for taxes. The judgment of the circuit court disposing of his litigation is a final adjudication, binding upon both the taxpayer and the public. It is binding upon the state and the county. It is binding upon the tax collector. This final judgment settles the taxpayer's liability. It fixes the amount of this liability. So much so that the tax collector is by statute required to take notice of the final disposition of the cause and govern his actions accordingly. If the taxpayer is successful, either in whole or in part, and before the trial of his appeal has paid his taxes, the county must make a proper refund, and so likewise must the state. It is significant that the legislature made no provision whereby the revenue agent must refund any commissions. If the recovery in this case is approved, then there is no law by which the revenue agent must refund any part of his commissions. Suppose that the First National Bank in this case had not voluntarily dismissed its appeal, but had won, and judgment final had been entered in its favor, annulling the assessment completely. Then the county would have been required to refund the full amount of taxes which the bank had paid as the county's *pro rata,* and no one would contend that under such circumstances the county should be liable for these commissions. Let us suppose, further, that the appeal prosecuted by the

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taxpayer for good cause could not be tried at the first term of the court, and pending its continuance the revenue agent were permitted to sue the said taxpayer, and should force a trial of his case and the entry of a final judgment in his favor before the appeal from the assessment could be tried and disposed of; then, in such case, the adjudication in favor of the state revenue agent would be a final adjudication, and, under the ordinary rules of pleading, the judgment recovered by the revenue agent might be well pleaded as *res adjudicata.*

It is manifest that the two suits involve the same subject-matter and both are essentially between the complaining taxpayer and the public. We are conscious of the fact that the circuit court on appeal from the assessment does not enter judgment *in personam,* as expressly ruled in *Bank* v. *Adams,* 74 Miss. 179, 21 So. 401, and *Ice Co.* v. *Adams,* 75 Miss. 410, 22 So. 944. The following language used by our court in these cases is applicable to the present issue. In the first named case our court, by WOODS, C. J., said:

"In this judgment are two fundamental findings, viz.: (1) That the bank's property was liable to taxation; and (2) that the valuation of the property or the amount of the assessment was sixty thousand dollars."

In the last-named case that portion of the judgment complained of, which was a judgment in *personam* was set aside; but, regardless of this fact, appellant was in this court taxed with all the costs or appeal, because, as stated by Judge WOODS:

"The real question litigated is determined against it—that is . . . because its liability to assessment and taxation is herein declared."

But it does not follow that the bond executed by the bank was not liable for the taxes.

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It is argued by counsel for appellee that the plea interposed by the appellant was a plea in abatement, and that this plea did not charge that the First National Bank had any good reason to believe that the assessment would be reversed or reduced, and that the plea does not show any meritorious grounds for the bank's appeal from the assessment. We prefer the view that the bank had the undoubted right under the law to prosecute this appeal by complying with the statute which grants the right, and that no one is to be condemned for the exercise of a legal right. The bank had the lawful right to contest the amount of its assessment. Whether it had good grounds for so doing was a matter to be determined in the circuit court of Harrison county by due process of law.

It is true that appellant styled its plea as one in abatement. We think this is immaterial. The plea stated a good defense to appellee's suit, and the demurrer should have been overruled. This being true, the demurrer will be overruled, the judgment of the learned circuit court reversed, and the cause remanded.

Reversed and remanded.

HOLDEN, J., dissents.

XYDIAS v. PELLMAN.

[83 South. 20, In Banc. No. 20962.]

JUSTICE OF THE PEACE. *Defective certification of record not cured or waived.*

Where a justice of the peace has failed to certify his record as required by section 84, Code 1906 (Hemingway's Code, section 64), the circuit court is without jurisdiction to try the case or render judgment therein and such defect may not be cured or waived, and where the justice makes an amendment or proper certificate after judgment, the same cannot relate back to give

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validity to the prior judgment, although after a proper certificate has been made the court has jurisdiction and may then proceed to try the case again.

APPEAL from the circuit court of Forest county. HON. R. S. HALL, Judge.

Suit by Jake Pellman against certain parties in justice court. Judgment was rendered for plaintiff and defendants appealed to the circuit court, where a judgment was again rendered for plaintiff, against the said defendant and A. J. Xydias as surety on the appeal bonds, and the surety moved to quash the execution and set aside the judgment; from the overruling of the motion the surety appeals.

The facts are fully stated in the opinion of the court.

T. C. Hannah, for appellant.

When this case was tried in the circuit court at the January, 1919, term, the circuit court was without jurisdiction to try the case and render judgment. There was nothing before the court except the original papers in the justice court, with a cost bill bearing the usual certificate as to the correctness of said cost bill.

This court in the case of *Rodgers* v. *City of Hattiesburg,* 99 Miss. 639, 55 So. 481, says: "The want of such a certified copy is not a defect which may be cured or waived. It is jurisdictional. Without it the circuit court cannot proceed with the case. It is without jurisdiction and on appeal to this court there is no jurisdiction here. The question of jurisdiction can be raised at any time." In support of this holding there is cited in the above opinion *Ruff v. Montgomery,* 83 Miss. 184, 35 So. 465; and *Bal* v. *Sledge,* 83 Miss. 747, 35 So. 214; *Gardner* v. *Railroad Company,* 78 Miss. 640, 29 So. 469; *McPhail* v. *Glann,* 47 So. 666; *City.*

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of Greenwood v. *Weaver*, 50 So. 981; *Allen* v. *State*, 53 So. 498. The same doctrine has later been announced and approved in the case of *Cawthorn* v. *State*, 57 So. 224.

A judgment having been rendered when the court was without jurisdiction is absolutely null and void. The appellant here proceeded to quash the execution and vacate the judgment in the manner expressly approved by this court in the case of *Kramer* v. *Holster*, 55 Miss. 243.

We respectfully submit that the trial court erred in overruling the motions of the appellant there and that this case should be reversed because of said error. We further respectfully submit that the trial court erred in sustaining the motion of the appellee to permit the justice of the peace to make the amendment shown by the record and to hold the original judgment rendered in this cause valid.

I do not want to be understood as contending that this record could not be amended. I, of course, admit that it was proper for the justice if the peace to supply the missing certificate. I do contend, however, that, in the first place, the amendment made in this matter was improper and unauthorized because there had never been any attempt to file the certificate required by the statute and there was, consequently, nothing to amend; and in the second place, that, when the amendment was made, it could not relate back so as to impart validity to a judgment that was absolutely null and void for the want of jurisdiction.

Section 64, Hemingway's Code (section 84, Code of 1906) provides the form of certificate as follows: "Copy of the record of the proceedings before a justice of the peace of —— county in district No. — of said county, in the case therein set forth, to wit: (Here copy the entries on the docket, and certify as follows, viz.:) "State of Mississippi, —— county:

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"I, ——, a justice of the peace of the said county, certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

"Given under my hand, this the —— day of ——, A. D. ——. —— J. D."

An examination of this record and especially the cost bill and testimony of H. C. Greer, reveals the fact that there was no effort made to comply with this section. No certificate of any kind, except that accompanying the cost bill, was filed in the circuit court.

Consequently, the only way in which this defect could be supplied was for the justice of the peace to come into the circuit court and supplement his record by attaching to it a certificate in accordance with the statute. The method adopted, I submit, was absolutely futile because it was an attempt to supply by amendment something that had never existed. Amendments cannot be allowed except where there has been some original attempt to supply the matter that is to be amended.

In 31 Cyc., page 302, it is said: "4. Necessity for something to amend by. In general, before an amendment will be allowed as to a matter of form, there must be something to amend by, that is, there must be something in the record to show that what is sought by the amendment was originally designed, but has been omitted through mistake or oversight."

A further analysis of the record shows that the only certificate that accompanied this record was in the following words: "I certify that the above is a true bill of costs."

It will be observed that the foregoing certificate is not an attempt to provide the certificate required by section 664 of Hemingway's Code, but that it is simply a certificate as to the correctness of the cost bill. In

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other words, there had never been an attempt on the part of the justice of the peace to provide the certificate required by the code and there was consequently no certificate in the record to amend. The only manner by which the requirements of the Code could be met was by the justice of peace preparing an entirely new certificate and attaching it to the original papers with leave of the court. But even granting that the amendment as made was the proper method of supplying the defect, and granting that the certificate to the bill of costs afforded the basis of an amendment, I respectfully submit that the certificate as amended does not meet the statutory requirements. The certificate that now accompanies this record is in the following language: "I certify that the above is a true copy of the proceedings in the above cause, a true bill of costs." It will be observed that this certificate does not meet the requirements of the statute. The justice of the peace, according to the statute, must copy the entries appearing on his docket and then certify, "that the foregoing is a copy of the record of the proceedings," etc. The certificate in the record in this case does not show any docket entries; does not show that it is a copy of the record, but merely shows, that the above is a true copy of the proceedings."

In *Hughston* v. *Cornish,* 59 Miss. 372, this court says: "Every justice of the peace shall keep a well-bound book, styled 'A docket,' in which he shall enter all the proceedings before him in every case. Code 1880, section 2193. That is the record of a case required to be made by the justice of the peace; his "minutes" to serve as a memorial of his proceedings in cases civil and criminal. It is this record that the justice is to transmit a copy to the clerk of the circuit court, when an appeal is taken from his decision. Code, 1880, pp. 2241, 2353, 2357."

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I therefore submit that the certificate now in this record is fatally defective because there is nothing to show any docket entries from the justice of the peace and the certificate fails to show that it is a copy of the record, but merely shows that it is a copy of the proceedings.

But, even granting for the sake of argument that the certificate that accompanied the cost bill afforded a predicate for the amendment, and granting that the amendment has been properly made, can this amendment operate to give life and vitality to a judgment that was rendered at a time when the circuit court had no jurisdiction in the matter? I respectfully submit this case was a pending cause in the circuit court and that the circuit court had no jurisdiction to render a judgment, because of the lack of this certificate. that when the certificate was supplied, that the case should have proceeded to trial *de novo.*

Suppose that a suit is filed in the circuit court and the sheriff receives process for the defendant and returns the same into court without having served it or making any return whatever thereon; that at the return term of court, judgment is rendered by default against the defendant, and execution is issued and a motion is made to quash the execution and vacate the judgment; that thereupon the sheriff proceeds and serves the summons on the defendant and makes a return showing the service of process long after the judgment has been rendered. I submit that there is just as much reason for holding that this service of process and the return thereon relates back so as to sustain the jurisdiction of the court and render the judgment valid as there is for holding that the amendment made in this case relates back so as to give vitality to the judgment rendered at the former term of court in this cause. Manifestly under the almost uniform holding of this court, the judgment that was

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rendered against the appellant here was absolutely void. The execution issued thereon was null and void. The motions made by this appellant should have been sustained and the motion made by the appellee to amend and correct his record should have been overruled.

Because of the errors committed by the trial court, I respectfully submit that this case should be reversed and remanded.

Tally & Mayson, for appellee.

The facts are about as stated. The appellant was not a defendant in the justice court, but became connected with the litigation by becoming surety on the appeal bond by which the case was removed to the circuit court. The execution of the appeal bond operated as a *supersedeas* of the judgment. Code of 19066, section 83, Hemingway's code, section 63.

When the record was sent to the circuit court together with the appeal bond, the court at least had jurisdiction to dismiss the appeal and render judgment on the appeal bond. *Pass* v. *Payne, et al.,* 63 Miss. 239; *Jacob* v. *Johnson,* 84 Miss. 450, 36 So. 544.

The bond was conditioned for the payment of such judgment as the circuit court might render. Code of 1906, section 83; Hemingway's Code, section 63. If then, the appeal could have been dismissed on motion of appellee in the circuit court, it was mere surplusage to have the jury pass on it. Under well-settled principles, the dismissal of an appeal operates as an affirmance of the judgment appealed from. *Pass* v. *Payne et al.,* 63 Miss. 239; *Jacobs* v. *Johnson,* 84 Miss. 450, 36 So. 544; *Howell* v. *Alma Milling Co.,* 38 American State Report, 694, and note at page 708; *Woodle* v. *Settlemyer,* L. R. A. 1915A, 839.

In the event it is necessary for the record to have the justice's certificate attached, it is a sufficient com-

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pliance with the statute to permit him to amend in the circuit court, as was done in this case. *Scudder-Gale Grocery Co.* v. *Rienzi Grocery Company,* 81 So. 122.

It is to be borne in mind that the appellant here was appellant in the circuit court and it behooved him to see that a perfect record was presented in that tribunal. We respectfully submit that he cannot now complain of the judgment rendered against him.

SYKES, J., delivered the opinion of the court.

The appellee, plaintiff in the lower court, filed suit against two parties in a justice of the peace court of Forest county . Judgment was rendered in favor of the plaintiff, and the defendants prosecuted an appeal to the circuit court. The appellant, A. J. Xydias, was one of the sureties on the defendants' appeal bond. The justice of the peace transmitted the papers to the circuit clerk, but failed to attach his certificate of the record as required by section 64 of Hemingway's Code (section 84, Code of 1906). The case was tried in the circuit court. A judgment was again rendered in favor of the plaintiff and against the defendants and this surety on the appeal bond. Subsequent to the adjournment of this term of court an execution was issued on this judgment. The appellant filed a motion in the circuit court to quash this execution, and also filed a motion to vacate and set aside the judgment against him in the circuit court, because of the want of jurisdiction in the circuit court to render this judgment. At the hearing of these motions of the appellant the justice of the peace who originally tried the case testified that the papers sent up by him were the original papers in the suit, and, over the objection of appellant, was allowed to certify to the papers in accordance with the above section of the Code. This certificate was made on his bill of costs. This certificate, while not exactly in accordance with the wording

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of the above section of the Code, is a substantial compliance with the same. The two motions of the appellant were then overruled by the circuit court and appellant appealed therefrom.

This court has repeatedly held that, where a justice of the peace has failed to certify his record as required by section 84, Code of 1906 (section 64, Hemingway's Code), the circuit court is without jurisdiction to try the case or render judgment therein. *Ruff* v. *Montgomery,* 83 Miss. 184, 35 So. 465; *Ball* v. *Sledge,* 82 Miss. 747, 35 So. 214; *Gardner* v. *Railroad,* 78 Miss. 640, 29 So. 469; *McPhail* v. *Blann,* 47 So. 666; *City of Greenwood* v. *Weaver,* 96 Miss. 604, 50 So. 981; *Allen* v. *State,* 98 Miss. 192, 53 So. 498; *Cawthon* v. *State,* 100 Miss. 834, 57 So. 224. This court has also held that the want of such a certified copy is not a defect which may be cured or waived, that it is jurisdictional, and that without this certificate the circuit court cannot proceed with the case. *Rodgers* v. *City of Hattiesburg,* 99 Miss. 639, 55 So. 481.

The circuit court being without jurisdiction to render judgment against this appellant, because of the failure of the justice of the peace to properly certify his record to the circuit court, it necessarily follows that the amended or proper certificate of the justice of the peace, made after the rendition of the judgment, could in no wise relate back to the time of the rendition of the judgment and give the circuit court jurisdiction at that time. It could have no such retroactive effect. The appellant's course in making these motions was proper, and both motions should have been sustained. *Kramer* v. *Holster,* 55 Miss. 243.

The proper certificate now having been made by the justice of the peace, the circuit court now has jurisdiction to try this cause, and it stands as a pending cause in that court.

Reversed and remanded.

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STEVENS, J. (dissenting).

The opinion of the court in this case is apparently justified by precedent, but the result reached so wounds my feelings of justice that I am compelled to withhold my assent. "That codeless myriad of precedent, that wilderness of single instances," has driven the court to a result that is wrong. The conclusion reached by the court, not only attempts to follow precedent, but, in my judgment, carries the force and effect of precedent a step too far. It will be observed that the court is now holding that a judgment rendered by the circuit court is absolutely void because of the fact, and the one fact alone, that the certificate of the justice of the peace in transmitting the record to the circuit court was a defective certificate. It will be observed, further, that the defendants, who lost the case in the justice court, themselves prosecuted the appeal to the circuit court, and the duty was upon them to perfect the record. Instead of perfecting the record, and having the justice of the peace attach a valid certificate, they went to trial in the circuit court without objection, lost their case, and prosecuted no direct appeal to this court. They waited until the sheriff attempted to execute this judgment before raising any question as to the infirmity of the record. It affirmatively appears that there was an appeal bond approved by the justice of the peace, and there was a substantial record of some kind in the circuit court. There is no suggestion or contention that no appeal bond was given and that no record was before the circuit court. It is merely a case of an imperfect certificate to the record.

In a great many of the cases in which this point has been relied upon it affirmatively appeared that there was no appeal bond and no record of any kind. In other cases heretofore disposed of by our court, an objection was made in the circuit court based upon the

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improper record. In all of the cases heretofore adjudicated the question was presented to this court on direct appeal. This is the first case in which the judgment has been attacked collaterally, on the ground that the circuit court was absolutely without jurisdiction, and consequently that the judgment rendered by the circuit court was void. There is language of this court in *Rogers* v. *City of Hattiesburg*, 99 Miss. 639, 55 So. 481, which justifies such holding. But the Rogers' Case presented a direct appeal to this court. In the case at bar there has been no direct appeal from the judgment complained of, but, as stated, a collateral attack is made upon this judgment. This, in my judgment, is carrying the question of jurisdiction beyond any adjudicated case, and giving to an alleged want of jurisdiction a far-reaching and dangerous result.

I have been taught that a valid appeal bond in accordance with the statute confers jurisdiction. Jurisdiction in the case at bar is made to turn, not only upon the presence of a record, but a perfect record. I do not dissent from the general proposition that a time and a place to make the complaint. In prosecuting defective record can be complained of, but there is an appeal from the circuit court to the supreme court, it is the valid appeal that confers jurisdiction, and it frequently happens that this court dockets and dismisses appeals where there is absolutely no record at all. I am afraid the court has confused technical jurisdiction and a fundamental defect in pleading and practice. All the text-writers and adjudicated cases hold that a final judgment, unappealed from, cannot be collaterally attacked as void, where the court had jurisdiction of the person and the subject-matter.

In the case at bar the parties were present before the court and tried their case, so undoubtedly the court had jurisdiction over the person. I prefer the view that the court had jurisdiction of the subject-

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matter. There was an actual trial, a real issue, and all based upon a substantial record. Suppose it were a criminal case, and the defendant was convicted, and had accepted the final judgment of the circuit court and had worked out his sentence at hard labor. The result which the court has reached would deny such an accused the benefit of a former adjudication, in event he were indicted for the same crime for which he had been tried, convicted, and suffered. "*Summum jus, summa injuria.*"

SHAW v. KLEIN.

[83 South. 20, In Banc. No. 20962.]

PHYSICIANS AND SURGEONS. *Evidence. Admissibility.*

Where in a suit against a physician and surgeon for negligence in performing an operation, the declaration expressly charged the defendant with want of skill and care thereby putting his possession thereof directly in issue, the testimony of other surgeons that defendant was a careful and skillful surgeon was admissible.

APPEAL from the circuit court of Lauderdale county. HON. R. W. HEIDELBERG, Judge.

Suit by Jesse E. Shaw against Dr. K. T. Klein. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

F. V. Brahan, for appellant.

Baskin & Wilbourn and *Jacobson & Brooks,* for appellee.

SMITH, C. J., delivered the opinion of the court.

The appellee, a physician and surgeon, performed a minor surgical operation on the appellant, who after-

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wards instituted this action in the court below to recover of the appellee damages alleged to have been sustained by him because of the negligence of the appellee in performing the operation. There was a verdict and judgment for the appellee.

One of the assignments of error presents for our determination the admissibility of the testimony of several surgeons that the appellee is a careful and skillful surgeon. The declaration expressly charges the appellee with the want of skill and care," thereby putting his possession thereof directly in issue; consequently evidence thereof was admissible.

Whether this evidence would have been admissible in the absence of such an allegation is not now before us for consideration.

There is no merit in the other assignments of error.

Affirmed.

SCHAFF v. KAHN & BERNSTEIN.

[83 South. 622, In Banc. No. 20953.]

1. APPEAL AND ERROR. *Whether cross-bill presents matter of common-law or equity jurisdiction will not be first considered on appeal.*

The question as to whether a cross-bill presented matter purely of common law jurisdiction and not equity jurisdiction cannot arise on appeal to the supreme court where no such objection was raised, in the court below.

2. EQUITY. *Cross-bill based on mistake in delivery of shipment of mules by carrier was germane to issue by carrier to recover value of shipment erroneously delivered.*

In a suit by a carrier to recover the value of a carload of mules delivered to defendants by mistake instead of another shipment intended for them, but delivered to a third party, a cross-bill in equity based on freight paid, expenses of feeding and handling, and damages to the second shipment, could be maintained; the two demands growing out of one transaction and

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being vitally related, so that the issues presented by the cross-bill were germane to the issues made by the original bill, particularly in view of the fact that if defendants could not maintain their cross-bill they would be forced to go to a foreign jurisdiction to prosecute their cross-action.

APPEAL from the chancery court of Adams county. HON. R. W. CUTRER, Chancellor.

Suit by Chas. E. Schaff receiver of the Missouri, Kansas & Texas Railroad Company, against Kahn & Bernstein, with cross-bill by defendants. From a decree overruling the demurrer to the cross-bill, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Ratliff & Kennedy, for appellant.

The contention of the complainant is that by paying off the claim of J. P. King, they should be subrogated to all his rights against Kahn & Bernstein and they stand in the shoes so to speak of King and that any claim Kahn & Bernstein might have against the director general of railroads for damages to another and distinct and separate shipment cannot be set off or recouped in this action, where the only right that the complainants have is a right of subrogation or the right to put himself in the shoes of King, who had this claim of King's; and secondly, the complainant conversion of his mules.

Kahn & Bernstein do not allege that they had any claim against King and complainant is suing for the known value of mules which belonged to King. If King had no right of action against Kahn & Bernstein for the wrongful conversion of his mules, then the complainant would have no cause of action against Kahn & Bernstein, as the rights of complainant against Kahn & Bernstein depend entirely upon the rights that King had; any claim of any kind or character that

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Kahn & Bernstein had against the director general of railroads could not be set off or recouped against this claim of King's; and secondly, the complainant contends that his action is one for a known, fixed and definite sum, the value of the carload of mules and the claim of the defendants, which they are seeking to either offset or recoup against the demand of the complainant, is for an unknown, indefinite unliquidated sum for damages to another separate and distinct car of mules and horses the one transaction having nothing whatever to do with the other.

We understand that it is a general rule, which has been uniformly applied in this state, that an unliquidated claim for damages is not the subject of offset or recoupment against a suit for a definite, known and fixed sum. We understand that it has been held, and in fact, it is the general rule that a defendant may recoup even a claim for unliquidated damages against a plaintiff, who sues him for a definite sum, where the defendant's claim for unliquidated damages grows out of the same transaction, for which the complainant sues or even out of similar transactions between the same parties in the past but it never has been held so far as we have been able to learn that a defendant may recoup a claim of unliquidated damages against a suit based upon a fixed and known, definite sum, having no connection whatever with the unliquidated claim for damages of the defendant.

Indeed, we understand from the pleadings in this cause, that counsel for the appellees concede this to be the law, but undertake to avoid the effect of that rule by setting up an agreement between defendants and a representative, the adjuster or claim agent of the Missouri, Kansas & Texas Railway Company, that that rule should be abrogated in this particular case, and that they were, by virtue of this agreement, to have the right to set off or recoup this claim.

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We are perfectly aware of the rule that for the purpose of this case, and on demurrer, all things that are well pleaded are to be taken as true, but we submit on the face of the cross-bill, that the agreement attempted to be set up is not well pleaded and is sufficient to take this case out of the general rule.

It must be perfectly clear to any one carefully reading the pleadings in this cause that the complainant's right upon which his cause of action is based is an equitable right of subrogation and is one for a fixed and definite amount and that the claim of unliquidated damages for injuries to another and distinct shipment of mules and horses to the defendant had no sort of connection or relation to or with the claim upon which the complainant sues and it has been the universal rule in this state, at least, so far as we have been able to find after diligent search of the authorities that a claim for unliquidated damages, such as this is, cannot be set off or recouped under the state of facts, appearing in the pleadings in this cause: *Casper* v. *Thigpen,* 45 Miss. 635. See also 34 Cyc., under the title, Recoupment, Set-off and Counterclaim, particularly page 654, under the subtitle, Unliquidated Demands.

We therefore, feel perfect confidence in our position that the chancellor erred in overruling this demurrer to the cross-bill and that his ruling thereon should be reversed and the demurrer sustained.

Engle & Laug, for appellee.

The judgment of the lower court should be sustained for two reasons: First because under the law of the state of Mississippi this is a proper case for the defendant to plead by way of set-off, recoupment or cross-bill as they have done.

In the case of *Wilkinson* v. *Searls,* the facts are as follows: "On April, 2, 1892, C. J. Searles a broker,

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doing business in Vicksburg, Miss., sold D. W. Wilkinson. a broker of Jackson, one hundred and twenty-five barrels of meal for two hundred and ninety-five dollars; prior to this it seems there had been various transactions between them, and Wilkinson had bought various bills of corn and other produce from Searls. On the 3rd day of May, 1892, Searls sued Wilkinson *in assumpsit* for two hundred and ninety-five dollars, the price of the meal sold on April 3d. Wilkinson admitted liability for this bill, but filed pleas by way of set-off amounting to two hundred and forty-six dollars, and tendered with his pleas a sum sufficient to pay balance due plaintiff, with interest. Plaintiff demurred to these pleas, because the account sought to be set off shows the claim to be for unliquidated damages. The demurrer was sustained. Defendant then filed additional pleas, 4, 5, and 6, and exhibit showing the nature and character of the items of which the defendant claimed an indebtedness by way of set-off. These pleas were in substance as follows: (4) that the defendant avers that before the commencement of this suit, plaintiff contracted to sell and deliver to him, at Jackson, Miss., ten carloads of corn, of a certain grade of corn; that the contract was in writing; that defendant paid the plaintiff for this corn according to contract, and before it was known that the plaintiff had not shipped the kind of corn he contracted to sell; that he shipped corn of a lower grade, of less weight; that the difference in value between the corn purchased and that actually delivered by the plaintiff was the sum of two hundred forty-six dollars and twelve cents and defendant sought to set off this amount against the claim of plaintiff. The fifth plea sets up substantially the same facts in regard to the ten carloads of corn; that the corn received was of less value by the sum of two hundred eighteen dollars and sixty-four cents than the corn contracted for; that defendant had previously pur-

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chased from plaintiff a carload of corn and a carload of oats; that these were short in weight, making a difference in value as to this of twenty-seven dollars and forty-eight cents. The sixth plea sets out that there had been various transactions between the parties, and that there was at and before the commencement of this suit an open and unsettled account current between them in which plaintiff was indebted to defendant in the sum of two hundred forty-six dollars and twelve cents of the items above mentioned. Plaintiff demurred to these pleas, because the pleas are an attempt to set off unliquidated damages growing out of prior transactions; that there is no sufficient allegation of any set-off or cross-action; and that said pleas are no defense; defendant declined to plead further, and judgment was entered in favor of plaintiff and defendant appealed."

And in that case no less a learned judge than CAMPBELL, C. J., held as follows: "CAMPBELL, C. J. The demurrer should have been overruled. The substance of the fourth, fifth, and sixth pleas is that the plaintiff has in his hands, by reason of former transactions (set forth in the pleas with needless particularity), money which the defendant is entitled to recover by an action for money had and received, and whatever may be true elsewhere, under our statute this is a valid set-off. There is nothing in any of the cases from our reports cited by counsel inconsistent with this view. On the contrary, they sustain it. Reversed, demurrer to the fourth, fifth and sixth pleas overruled, and cause remanded for further proceedings in the circuit court." The *Wilkinson* v. *Searls case;* goes much further than does the instant case in holding that set-off is proper under such facts as are now present and we submit that as long as the doctrine of *stare decisis et non quieta movere* obtains in this state that the learned chancellor was right in overruling the demurrer. See,

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also, *Miller* v. *American National Bank,* 76 Miss. 84, 23 So. 439; *Adams Machine Co.* v. *Thomas,* 87 Miss. 391, 39 So. 819; *Hayes* v. *Slidwell Liquor Co.,* 99 Miss. 583, 55 So. 356.

Courts of equity as a general rule put the same construction on the statute of set-off as do courts of law, and generally follow the law in regard to matters of set-off unless there is some peculiar circumstance or intervening natural equity growing out of the mutual transactions or conditions of the parties going beyond the statute which constitutes the general basis of set-off at law and which a court of law could not regard in which case courts of equity will allow a set-off which a court of law would refuse. 34 Cyc. 635, (3) citing 7 How. 386; 40 Am. Dec. 70.

The several forms of cross demand, such as recoupment, set-off, counter-claim and the likes, are similar, in that their common object is by allowing the entire controversy between the parties to be litigated and finally determined in one action, to advance justice by preventing circuity of action and suppressing multiplicity of litigation, whereever this can be done with entire justice to all of the parties before the court, and without great inconvenience in practice. These remedies are for this reason favored by the courts, which have been disposed in recent years to extend to the greatest length compatible with the legal rights of the parties, the doctrine of allowing matters to be settled in one suit rather than compel defendant to resort to his cross-action; and the courts will, where possible, relax the strict rules of pleading where a right of set-off is shown, and in equity the most liberal rules prevail in allowance of set-off to prevent injustice and circuity of action." 34 Cyc., 644-646.

Second: The demurrer should have been overruled for the reason that at page 10 of the record, paragraph 2, it is set out that: "Respondents show that by the

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conduct and action of the complainant, its representatives and agents, it is estopped to object to having considered in this case the damage sustained by the defendants in connection with the delayed shipment and the expense incurred by them and omission to which they are entitled in connection with the sale of the first shipment." It will be noted here that the appellees plead an estoppel on the part of appellant.

The appellant by its demurrer admitted that they were estopped to object to having considered in this case the damages sustained by the appellees in connection with the delayed shipment and the other items for excess freight and feeding charges and for a commission and by the demurrer admitting that they are estopped, we submit that the demurrer must be overruled.

The appellant cannot blow hot and cold and by the demurrer admit the estoppel of having the two matters considered together and in the next breath claim that the suits cannot be considered together. The statutory restrictions upon set-off may be abrogated either by agreement between the parties or by estoppel. 34 Cyc. 648.

An agreement to allow set-off need not be expressed but may be inferred from the circumstances and as courts favor the settling of disputes between the parties in one action an agreement to allow set-off will be inferred from very slight circumstances. 34 Cyc. 649-650.

"In the view of equity the setting off of one demand against another between the same parties is extremely just and where there is any technical difficulty in the way of its being done without an agreement, the court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts." 34 Cyc. 6650, note 56, citing 10 Sm. & M. 179.

For the above reasons set forth we submit that the

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learned chancellor's judgment should be sustained and the demurrer was properly overruled. We ask for an affirmance in this case.

STEVENS, J., delivered the opinion of the court.

The pleadings in this case consist of an original bill, answer, and cross-bill. This appeal is prosecuted from a decree of the chancery court overruling the demurrer to the cross-bill. The bill is one exhibited by Chas. E. Schaff, receiver of the Missouri, Kansas & Texas Railway Company, against Kahn & Bernstein to recover the value of a carload of mules which the complainant railway company transported from Ft. Scott, Kan., to Natchez, Miss., and by mistake delivered to appellees. The bill and cross-bill reflect the following state of facts: A member of appellee firm went to Ft. Scott, Kan., for the purpose of buying mules and horses and there purchased from the Ft. Scott Horse & Mule Company a carload of horses and mules, consisting of twenty-one mules and eight horses, to be shipped to appellees at Natchez. This car was delivered to appellant railway company for shipment. At the same time one J. P. King of Tennessee purchased from the same parties twenty-six mules and delivered the same to the complainant railway company to be shipped to Dechard, Tenn. By mistake Mr. King's carload of mules was billed to and delivered to appellees, while appellees' mixed car of horses and mules was shipped to Tennessee. When the King mules arrived at Natchez, Mr. Kahn, a member of appellee company, advised the agent that he, Kahn, did not think the mules belonged to appellees, but the agent insisted upon delivery and assured appellees that if any mistake had been made that appellees would not suffer. The shipment to Mr. King in Tennessee was rejected, and eventually the mixed carload of horses

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and mules was reshipped from Tennessee to Natchez and delivered to appellees. Appellant thereupon paid Mr. King the value of his mules and by original bill sues appellees for the amount paid King. Appellant did not take a bill of sale or assignment of the cause of action from Mr. King, and on that account avers in the original bill the necessity of instituting this suit in equity. The answer of the defendant is made a cross-bill in which it is averred that at the time the first shipment of mules reached appellees Mr. Berstein, a member of the firm, was absent buying mules and that his partner, Max Kahn, protested against receiving the shipment and the agent then "told him to go ahead and sell the mules and pay the freight bill, and if it developed that that there was a mistake then he could adjust with the railway company for what he got for the mules less the expenses of selling them and his reasonable commission," etc., and with this understanding he did pay the freight, sold and disposed of the mules, and by reason thereof is entitled to a reasonable charge or commission for selling them.

It is furthermore set forth in the cross-bill with a sufficient degree of certainty that the carload of horses and mules which appellees did buy were erroneously shipped and diverted to other points, were kept on the road a long time, that is to say, from February 5, 1918, to February 23, 1918, and that on account of the long and circuitous journey the animals were debilitated, abused, and underfed and injured in transit and depreciated in value in the sum of at least one thousand dollars; that there was an overcharge in the feed bill amounting to three hundred and twenty-five dollars; and that three of the animals received injuries from which they subsequently died, and that the value of the three dead animals is at least four hundred and eighty dollars.

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It is furthermore averred that appellees complained at the rough treatment given the shipment, and that an adjuster for appellant advised them not to put in a separate claim on account of alleged damages, but stated that appellees' claim for damages would be adjusted in connection with the settlement of the carload of mules delivered appellees by mistake, and that both claims had been treated and considered by all parties to this suit as a claim growing out of the same transaction, and that appellees are entitled to plead the amount of their demand against appellant as a set-off. There is tabulated in the cross-bill the following itemized statement of appellees' set-off:

Amount of freight paid on shipment sued for	$ 140 00
Amount of feed and expenses of handling 26 mules sued for	200 00
Reasonable commission for handling same	520 00
Total of above	$ 860 00
Damage to animals in second shipment	$1,000 00
Excess feed and freight bill	325 00
Value of three animals which died out of second shipment	480 00
Total damage on all of above items	$2,665 00

It is furthermore averred in the cross-bill that if appellees are not entitled to plead their counterclaim by way of a set-off, they averred that the mistake in the two shipments is one transaction and that appellees should be permitted to plead their cross-demand by way of recoupment. There are other and further allegations in the cross-bill to the effect that appellees should be accorded the right to plead their demand by way of cross-bill. The original bill seeks a recovery in the sum of six thousand, fifty-six dollars and ninety-six cents. There was a general demurrer to the cross-bill,

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submitting several grounds of attack, but the substance of the demurrer submits the main contentions that the unliquidated demand of appellees cannot be off-set against the socalled fixed demand sought to be recovered in the original bill and that the cross-demand of appellees is based upon a separate and distinct transaction and that the two demands are unrelated. The chancellor overruled the demurrer, but granted an appeal to settle the principles of the case.

There is no contention in this case that the cross-bill presents matter purely of common-law jurisdiction and not of equity jurisdiction, and upon this appeal no such question could arise. *Irion* v. *Cole,* 78 Miss. 132, 28 So. 803. The real issue upon the demurrer is whether the cross-bill introduces such new matter as is not necessary for appellees' defense and that is in no way germane to the issue raised by the original bill. If the cross-bill is predicated upon a demand which grows out of the same subject-matter involved in the original bill, then certainly the demurrer is not well taken and was properly overruled. *Dewees* v. *Dewees,* 55 Miss. 315.

As we view and interpret the facts set forth in both the original bill and the cross-bill, the whole controversy is the offspring of a mistake for which appellant railway company must be responsible. It is perfectly manifest from the pleadings that appellant received on the same day for shipment two separate carloads of live stock consigned to different parties at different places; that these two shipments were confused and interchanged; that appellant thereafter recognized and admitted its responsibility by settling with King and then initiates litigation which is the upshot of its own negligence. The very demand upon which appellant is forced to enter the door of equity is necessitated by the very mistake which has given rise to appellees' claim for damages. The two demands grew out of

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one transaction and are vitally related. This being true, we think the issue presented by the cross-bill is germane to the issue made by the original bill. It is stated in 34 Cyc., p. 646:

"In equity the most liberal rules prevail in allowance of set-off to prevent injustice and circuity of action."

We believe it is the tendency of modern decisions to sufficiently relax the strict technical rules of pleading to permit matters in dispute between the same parties to be settled in one suit and thereby advance instead of delay justice and thereby avoid multiplicity of litigation. The rule has its reasonable limitations, and these limitations are usually expressed in equity practice under the general doctrine that the issue presented by the cross-bill must be germane to the main one presented by the original bill. To maintain the cross-bill in this case will, we think, promote justice and avoid circuity of action. It appears upon the face of the pleadings that if appellees cannot maintain their cross-bill they will be forced to go to a foreign jurisdiction to prosecute their cross-action. Many authorities hold that nonresidence is a sufficient ground for an equitable set-off. *Ewing Merkle Elec. Co.* v. *Louisville Light & W. Co.*, 92 Ark., 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21, 19 Ann. Cas. 1041, and case note. Without intimating any opinion as to whether nonresidence is alone a sufficient ground for entertaining a cross-bill, we do think it is a circumstance which strengthens the equity of appellees' demand.

The decree of the learned chancery court will be affirmed, and the cause remanded.

Affirmed and remanded.

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POMES v. MCCOMB CITY.

[83 South. 636, In Banc. No. 20884.]

1. MUNICIPAL CORPORATIONS. *Not liable for injuries to pedestrians from projection three inches above ground at street crossings.*

Where in an action against a city by a pedestrian, the declaration alleged that plaintiff was injured while crossing at a regular street crossing, by striking her foot against a brick or stone which the city had permitted to remain firmly imbedded in the crossing and protruding two or three inches above ground, the court held that a demurrer to the declaration was properly sustained.

2. SAME.

In such case it will be presumed that the plaintiff stated her case in her declaration and she could not make by her evidence a stronger or different case than that stated in her declaration.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Suit by Mrs. M. J. Pomes against McComb City. From a judgment for defendant, plaintiff appeals.

The grounds for demurrer mentioned in the opinion are as follows:

(1) The declaration in its entirety fails to state a cause of action against the defendant.

(2) A municipality is not required to keep its streets in perfectly safe condition.

(3) It is not negligent under the law for city authorities to knowingly permit a brick or stone protruding some two or three inches above the ground to remain in an unpaved street.

(4) That a brick or stone thoroughly embeded in the ground, and protruding some two or three inches above the ground, is not an obstruction in the contemplation of the law, which to be allowed or permitted to remain in the unpaved street is negligence.

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And for other causes to be made known on the hearing.

P. Z Jones, for appellant.

The defendant demurred to the declaration setting up among other contentions the following: It is not negligent under the law for city authorities to knowingly permit a brick or stone protruding some two or three inches above the ground to remain in an unpaved street. That a brick or stone thoroughly embedded in the ground and protruding some two or three inches above the ground is not an obstruction in the contemplation of the law which to be allowed or permitted to remain in the unpaved street is negligence.

This demurrer was sustained and from the judgment of the court sustaining this demurrer and dismissing the suit, the plaintiff prosecutes an appeal to this court. The error assigned is the action of the court in sustaining the demurrer. The action of the court in sustaining the demurrer and dismissing the declaration was at least in our judgment premature and a prejudging of the case without having the merits presented or considered.

Whether it is negligent or not for municipal authorities to allow and permit objects to extend up above the surface of streets, street crossings or sidewalks would seem to depend largely on the kind of material used in their construction and maintenance. If sand and gravel is used, a different rule would prevail than where concrete has been used. A brick pavement or crossing would not be as smooth and even as one of macadam, or other such like material.

The demurrer erroneously assumes as an admitted and proven fact that the streets of McComb are unpaved and that the accident in question occurred on an unpaved street crossing. There is no allegation to this effect in

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the declaration and there is nothing in the record to show that such is the fact.

The rule seems to be that municipalities are required to keep their streets, sidewalks and crossings in reasonably safe condition for use by persons who will exercise reasonable and ordinary care. *City of Meridian* v. *Crook*, 109 Miss. 700, et seq.

Whether the municipality has complied with the law depends on the facts and circumstances and all of the surroundings and conditions which can only be ascertained by an investigation and hearing of the facts.

Should it develop that this accident occurred in the heart of the business section of the city where the travel is constant and a multitude of persons are accustomed to use the crossing daily, and that the obstruction at this particular point was dangerous to persons in the reasonable and ordinary use of the crossing, and using it with due and reasonable care for their own safety, then it occurs to us that it would be a question for the jury to determine from all of the evidence as to whether its existence was or was not due to negligence o nthe part of the city authorities.

Should it develop also that at this particular point the city had recently been engaged in street repairing, and had a portion of the street crossing torn up and reconstructed, or that the crossing had been repaired and the rubbish and debris were left in the crossing by servants and agents of the city, and left there for such a length of time as to become embedded in the street, and thus become a menace and source of danger to persons using the crossing, and that this unsafe condition had existed long enough for the city to know of it by the exercise of reasonable diligence, and that with such knowledge of the dangerous and unsafe condition of the crossing the city had permitted it to remain and continue in that unsafe condition, and the plaintiff with-

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out knowledge of this unsafe condition and while in the exercise of reasonable and the usual care in passing along over this crossing was injured and sustained damages, would it not be a question for the jury under all of the facts to say whether the city was liable on account of its negligence?

As said by this court, speaking through a former justice, in the case of *Bell* v. *Railroad Company*, 30 So. 821, and *Stevens* v. *Railroad Company*, 81 Miss. 206; "So many questions are integrated usually into the solution of the question of negligence—it is so necessary to examine all the circumstances making up the situation in each case—that it must be a rare case of negligence that the court will take from a jury."

A judge, sequestered from the ordinary man in the pursuit of his ordinary affairs in the rough and tumble game, is not prepared to say what is and what is not reasonable and proper care—does not have the same viewpoint as the rough and ready representative juror, taken from the surging, struggling crowd. In the Meridian case the facts were fully developed from these facts it appeared that there were a few loose bricks on a sidewalk. That the plaintiff in that case was in a hurry and did not notice. The plaintiff in the Meridian case was shown to be guilty of carelessness and negligence. She said that she was not on her guard. That if she had not been in a hurry she would have been on her guard. If it is the law that the pedestrian must use reasonable and ordinary care, one of the instructions given the jury eliminated from the consideration of the jury the manner in which the plaintiff was using the sidewalk.

Further it did not appear from the evidence that the loose bricks in the sidewalk had been there long enough for the city authorities to know of them. Nor was there any evidence in the case that the loose bricks in the

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sidewalk made it unsafe. It was charged and alleged in this declaration that the city carelessly, negligently and knowingly permitted this obstruction to remain and be in the street crossing.

It was averred and alleged that the city is guilty of gross negligence in knowingly permitting the obstruction to remain in the street. It is averred that the plaintiff sustained injury. All of these allegations are admitted by the demurrer. It is admitted that the city was guilty of negligence and yet the court sustained the demurrer and said in the face and teeth of these allegations of fact that the city was not negligent.

Did not the declaration make out such a case as to require the city to plead and show, first, that the alleged obstruction did not render the crossing unsafe for travel, and second, that if the obstruction existed, it had not been there for a sufficient length of time for the city to be chargeable with notice.

We dissent from the argument of the appellee that an obstruction in street crossing in a populous city and in the heart of such city, causing a fall and injury such as that described in this declaration fails to show a want of proper care on the part of the city authorities. This is not such an accident as is likely to occur in the ordinary course of things where proper care has been observed. Either the plaintiff was guilty of inexcusable fault and negligence or the city authorities have been negligent. 1 Thompson on Negligence, section 15.

It is true that the degree of care required of the city authorities is ordinary and reasonable care. But there was a defect in the street crossing and there was an accident and resulting injury. The burden was on the city to rebut the presumption of negligence. *A. & V. Railway Co.* v. *Groome,* 97 Miss. 201.

One of the instructions granted the railroad company, which was assigned as error, was as follows: "The

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court instructs the jury for the plaintiff, that the law in this case presumes that plaintiff's injury resulted from the negligent failure of the defendant company to furnish a safe and secure platform at the place where plaintiff was hurt. The burden is upon the defendant to rebut this presumption by evidence that it exercised reasonable care to build and maintain said platform in a safe condition for the use of its employees. If the jury do not believe from the evidence, that defendant exercised reasonable care to maintain said platform in a safe and secure condition then they will find a verdict for the plaintiff."

This instruction was held to announce the law correctly. We submit that the same decree of care is required of municipal authorities to build and maintain their streets, sidewalks and crossings for the use of the traveling public that is laid upon railroad companies by the above rule of law contained in the above granted instruction, and measured by this law and this rule the demurrer to this declaration should not have been sustained.

We believe that the judgment of the court below should be reversed and vacated and a new trial ordered

W. B. Mixon, for appellee.

The gist of the case attempted to be stated in appellant's declaration is quoted on the first page of the brief of her counsel and shows that the brick or stone complained of was a part of the surface of the street as the declaration alleges that it was "thoroughly embedded in the ground," and the complaint is that it was "protruding some two or three inches above the ground."

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The case of *Meridian* v. *Crook,* 109 Miss. 700, which was reversed and judgment given for the city by this court is decisive of every proposition which could be raised under the allegations of this declaration, and is a much stronger case against the city, in that, the plaintiff in that case was traveling in the dark, while in this case the plaintiff was walking along in the open daylight.

There is no allegation that this was a paved street or in the business portion of the city, or that the plaintiff's attention was diverted from the exercise of the care required in looking out for protrusions or indentations in the surface of the street.

The case cited and the authorities quoted in the opinion seem to answer every argument in appellant's brief and I respectfully quote the following from the opinion of the court as a most sane and sensible view of the law: "To sustain the judgment recovered by appellee in this case would be to announce a new measure of liability on the part of municipalities in the construction and maintenance of sidewalks. It would be equivalent to holding that sidewalks in the residence portion of our cities must not deviate three inches from a perfectly smooth surface, and force the maintenance of sidewalks of cement or some similar construction. The practical result would be to render municipalities insurers of the safety of pedestrians. A municipality is nothing more than a majority of its citizens, and in the administration of its corporate affairs courts must continue to apply the rule of reason. The defect in the sidewalk here complained of is just such a defect as perhaps exists in every municipality in the state, and the fall is one that might, by accident, be experienced by any one in the home or on the streets."

I respectfully submit that the judgment in this case should be affirmed.

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COOK, J., delivered the opinion of the court.

The declaration in this case, omitting the formal parts, is in these words, viz.:

"Mrs. M. J. Pomes, a resident citizen of Pike county, Mississippi, plaintiff, sues the city of McComb, a municipal corporation existing under and by virtue of the laws of the State of Mississippi, defendant, and for cause of action would show unto the court the following statements of facts, to wit: That whereas, on, heretofore, to wit, at 4 p. m. on Friday, January 26, 1917, while returning home from down town, and while crossing the regular crossing on Third street going west from D. C. Lenoir's on Louisiana avenue, and while walking along the said crossing, which she assumed to be in a perfectly safe condition, her foot struck a brick or stone which the city had carelessly, negligently, and knowingly permitted to remain in the said pathway, and which was protruding some two or three inches above the ground, and on striking the said obstruction, on account of its size and it being thoroughly imbedded in the ground, threw your plaintiff violently on the ground, and caused her to suffer great mental pain and anguish, and crushed her arm and nose, and dislocated her hip, and severely lacerated arm and other parts of her body, and injured her internally.

"Your plaintiff would show that on account of the said injury so received she remained in bed a number of days, during which time she suffered great pain and anguish, and had to be and was under the care and treatment of skilled physicians, and has since been under the said treatment, and is so informed and charges that she is permanently injured. Plaintiff furthr charges that the said crossing was not only regularly used by pedestrians, but was worked and supposed to have been kept up by the city, and that it was the duty of the city to keep

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the said crossing in a reasonably safe condition, and it is guilty of gross negligence in knowing and permitting the said obstruction to remain in the street. Wherefore, by reason of the gross negligence and carelessness of the defendant in knowing and permitting the said obstruction to remain therein before indicated, she hereby sues and demands judgment of the city of McComb in the sum of five thousand dollars and all costs."

The defendant demurred to the declaration, the demurrer was sustained, and plaintiff appeals to this court.

We have reached the conclusion that this appeal is ruled by the case of *City of Meridian* v. *Crook,* 109 Miss. 700, 69 So. 182, L. R. A. 1916A, 482.

There is no merit in the argument that the learned circuit judge should have overruled the demurrer and heard the case as developed by the witnesses. It will be presumed that the plaintiff stated her case in her declaration, and certain it is that she could not make a stronger or different case from the case stated in her declaration.

Affirmed.

WILLIAMS v. STATE.

[83 South. 337, In Banc. No. 20676.]

This case was first reported in 82 So. 318, and affirmed. On suggestion of error the case was reversed and the court adopted the dissenting opinion of Judge Holden.

APPEAL from the circuit court of Washington county.

HON. H. H. ELMORE, Judge.

On suggestion of error, suggestion sustained and cause reversed and remanded. For former opinion see 82 So. 318, 120 Miss. 604.

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A. H. Turnage, for appellant.

Ross A. Collins, Attorney-General, for the State.

COOK, J., delivered the opinion of the court.

A re-examination of the law of this case has convinced me that I was in error when I voted to affirm the judgment of the trial court, sentencing appellant to death. It is now my opinion that the facts did not warrant a conviction of murder. Section 1237, Code of 1906, was designed to meet just such cases as is made by the record before us.

It follows that I concur in the opinion written by Judge HOLDEN (82 So. 318). Nothing I could say would add anything to his thorough and able discussion of the law and facts.

The judgment of the trial court will be reversed, and the cause remanded for a retrial in accordance with the principles announced in the aforementioned opinion.

Reversed and remanded.

ETHRIDGE, HOLDEN, and STEVENS, JJ., concurring.

SYKES and SMITH, JJ., dissenting.

WHITE ET AL. v. BOARD OF SUPERVISORS OF SCOTT COUNTY.

[83 South. 611, In Banc. No. 20877.]

APPEAL AND ERROR. *Stenographer's notes not filed persuant to notice given within thirty days after adjournment of term will be stricken from record.*

Under Laws 1910, chapter 111, par. (D) Hemingway's Code, section 585, so providing, notice to the stenographer to file his notes of oral evidence taken at a trial must be given within thirty days

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of the adjournment of the term of court at which the trial was had and where the appellant did not give such notice until thirty-five days had elapsed after the adjournment of the term, such evidence on appeal will, on motion, be stricken from the record, though not claimed to be incorrect in any particular.

APPEAL from the chancery court of Scott county.

HON. G. C. TANN, Chancellor.

Suit between C. E. White and others and the Board of Supervisors of Scott County. The former appeals.

The facts are fully stated in the opinion of the court.

J. P. White, for appellant.

Watkins & Watkins, for appellee.

SMITH, C. J., delivered the opinion of the court.

The evidence introduced in the court below was in part by deposition and in part oral; the latter being taken down by a stenographer in accordance with the statute so providing. The notice to the stenographer to transcribe his notes of the evidence was not given by the appellant until thirty-five days after the adjournment of the term of court at which the case was tried, and there is indorsed on it neither the approval of counsel for the appellee nor agreement that it shall constitute a part of the record.

While it does not appear and is not contended by counsel for the appellee that the stenographer's transcript of the evidence is incorrect in any material particular, nevertheless the motion to strike it from the record must be sustained, for the reason that he was without the right to file his transcript as a part of the record, unless notice had been given him to do so within thirty days after the adjournment of court at which the case was tried. Laws 1910, chapter 111, par. (d);

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Hemingway's Code, section 585; *Richmond* v. *Enochs*, 109 Miss. 14, 67 So. 649; *Lee Line Steamer* v. *American Export Co.*, 109 Miss. 524, 68 So. 771.

The motion, therefore, will be sustained, and the stenograher's notes of the oral evidence introduced on the trial will be stricken from the record, leaving, of course, the depositions to remain as a part of the record.

Sustained.

HOUSE v. STATE.

[83 South. 611, In Banc. No. 21053.]

CRIMINAL LAW. *Where guilt of defendant manifest improper remarks of district attorney not reversible error.*

Where on a trial for murder the guilt of the defendant was manifest from the evidence and the jury under their oaths could not have arrived at any other verdict than that of guilty, it was not reversible error for the district attorney in his argument to comment on the fact that the defendant did not testify through such comment was in violation of Code 1906, section 1918 (Hemingway's Code, section 1578) forbidding comment.

APPEAL from the circuit court of Pearl River county. HON. A. E. WEATHERSBY, Judge.

Diamond House was convicted of murder and appeals. The facts are fully stated in the opinion of the court.

Currie & Smith, for appellant.

N. T. Currie, Assistant Attorney-General, for the State.

No brief of counsel for either side found in the record.

SMITH, C. J., delivered the opinion of the court.

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This is an appeal from a conviction for murder, followed by a death sentence.

There is no merit in any of the assignments of error, only one of which will be here specifically noticed.

The appellant introduced no evidence, and it appears from a special bill of exceptions that a privately employed counsel, who was assisting the district attorney in the prosecution, used the following language in his argument to the jury:

"There are no eyewitnesses in this case, but Diamond House is responsible for that. There are two people living now who know how this happened. One of them came and told you."

Assuming for the sake of the argument that counsel for the appellant are correct in their contention that this language is a comment on the appellant's failure to testify, and violates section 1918, Code of 1906 (section 1578, Hemingway's Code), nevertheless we cannot reverse therefor for the reason that the appellant could not have been prejudiced thereby. His guilt is manifest from the evidence, and the jury could not, under their oaths, have arrived at any verdict other than one of guilty. *Wells* v. *State,* 96 Miss. 500, 51 So. 209.

Affirmed, and Friday, the 26th day of March, 1920, fixed as the day for the execution of the sentence.

Affirmed.

RUTLAND ET AL. *v.* McINTOSH ET AL.

[83 South 635, In Banc No. 20888.]

EQUITY. *Relief not supported by pleadings, ground for reversal.*

The supreme court on appeal will reverse a decree of the lower court where the relief granted was not specifically prayed for and should not have been granted under the general prayer, for the reason that it was not supported by any allegation in the bill of complaint.

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APPEAL from the chancery court of Smith county.

HON. D. M. RUSSELL, Chancellor.

Bill by H. M. McIntoch and others against Joe Rutland and others. From a decree for complainants, defendants appeal.

The facts are fully stated in the opinion of the court.

T. J. Wills, for appellant.

R. C. Russell and *Wells, May & Sanders,* for appellee.

SMITH, C. J., delivered the opinion of the court.

The relief granted the appellee, who was the complainant in the court below, was not that specifically prayed for by him in his bill of complaint, and should not have been granted under the general prayer therein for the reason that it is not supported by any allegation in the bill of complaint.

Reversed and remanded.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1920,

YAZOO & M. V. R. R. Co. *v.* DEES.

[83 South. 613, In Banc. No. 20945.]

1. MASTER AND SERVANT. *Ordinary risks assumed Federal Employer's Liability Act. Risks not assumed.*

   A servant by merely entering the service of the master assumes the ordinary risks of the service; and if he is injured solely because of them he cannot recover, but at common law, and under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master.

2. MASTER AND SERVANT. *Employees within Federal Employer's Liability Act assumed risks of switch light going out without fault, but not for lack of oil.*

   Under the Federal Employer's Liability Act (U. S. Comp. St., section 18657-8665), a railroad yard employee assumed the risk of the light on the switch stand over which he stumbled going out without fault on the employer's part, but not the risk arising from the failure of the employee in charge thereof to keep it filled with oil, unless he had actual or constructive knowledge before the injury that the light was out.

3. MASTER AND SERVANT. *Railroad charged with duty to keep switch lights burning.*

   Although lights were primarily placed on railway switch stands to show whether the switches were open or closed their presence was an invitation to employees to use them for the purpose of

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locating and avoiding the switch stands and it was the employer's duty to exercise reasonable care to keep them burning for this purpose.

4. MASTER AND SERVANT. *Risk from employer's negligence not assumed under Federal Employers Liability Act.*

Under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) an employee does not assume a risk created by his employer's negligence merely because he had as good an opportunity as the employer of knowing of its existence.

5. TRIAL. *Refusal of instruction the substance of which has already been given.*

It was not error to refuse an instruction the substance of which had already been given in other instructions.

6. MASTER AND SERVANT. *Servant did not assume risk under Federal Employer's Liability Act though he knew location of unlighted switch.*

Under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) a railroad employee stumbling over an unlighted stand did not assume the risk though he had worked in the yards for years and knew where the switch stand was located, where he fell over the switch in the dark, not knowing that he was in its vicinity.

7. TRIAL. *Limit to instructions.*

Trial courts are required and should only grant instructions sufficient in number and character, to guide the jury in determining the issues involved in the case on trial and they have the right to limit the number of instructions to be considered by them accordingly, but this should not be done arbitrarily.

8. DAMAGE. *Amount.*

For an injury causing a double hernia, permanent unless relieved by a dangerous operation which might not be successful, and causing pain at intervals and compelling plaintiff to wear a truss and materially reducing his capacity for work, a verdict by the jury for $15,000 was not excessive.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Suit by John C. Dees against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

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The facts are fully stated in the opinion of the court.

Charles N. Burch, H. D. Minor and *Hirsh, Dent & Landau,* for appellant.

The decisions of the supreme court of the United States applicable to the facts of this case, control. "Whenever Congress enacts statutes pursuant to its power under the commerce clause, such laws, when enforced in both state and federal courts must be construed in the light of federal decisions and applicable common-law principles as interpreted and applied in the federal courts to the exclusion of common-law rules different therefrom enforced in state courts. It therefore follows that even in actions under the federal act prosecuted in state courts the decisions of the state courts do not govern in determining the application of the doctrine of assumption of risk if the rules therein adopted differ from those applied in the federal courts." 1 Roberts' Federal Liabilities of Carriers, sec. 557; *Southern R. Co.* v. *Gray,* 241 U. S. 333.

3. Plaintiffs assumed the ordinary risks incident to his employment. Plaintiff assumes the ordinary risks normally incident to his occupation whether he was actually aware of them or not." 1 Robert Federal Liabilities of Carriers, sec. 558; *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492-504.

4. Plaintiff assumed the extraordinary risks due to negligence of employer and fellow employees when known and appreciated by him. "Under the federal Employer's Liability Act, except in the cases specified in section 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him." *Boldt* v. *Pennsylvania Railroad Co.,* 245 U. S. 441.

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Even, therefore, if the lamp tender had been incompetent (the fact that he was competent was established in this case), his failure to keep these lamps lighted, admittedly known to plaintiff, would defeat any action to recover for injury, sustained by reason of any defective lighting; but it is also established in this action that the lighting was in no respect defective, and, on the contrary, it was shown that the lights in the best lamps are occasionally extinguished.

5. Master not an insurer of the safety of the employee and he must have actual or constructive notice of a defect before plaintiff can recover. "The master does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist, the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care, could have known that such machinery and appliance had become defective and were in an unsafe condition." In other words, it must appear in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged to have caused the injury, and these facts must be established by legal evidence. *Washington, etc., Railway Co.* v. *McDade,* 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 205; *Norfolk & Western Ry. Co.* v. *Reed,* 167 Fed. 16, 92 C. C. A. 78; *Virginia, etc., Wheel Co.* v. *Chalkley,* 98 Va. 62, 34 S. E. 676." *Barett* v. *Virginia Ry. Co.* 244 Fed. 399; *Hope* v. *Railroad Company,* 98 Miss. 829; *Mississippi Central R. R. Co.* v. *Bennett,* 111 Miss. 163; *Lumber Co.* v. *Garner,* 117 Miss. 814; *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, 501; *Yazoo & Mississippi Valley Railroad Company* v. *Mullins, administratrix* (April 21, 1919); United States Supreme Court Advance Opinions, No. 13, p 433, Lawyers Co-op. Publishing Company.

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6. Master only required to see that the instrumentalities are reasonably safe, for the functions designated. "A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed."

"It is universally agreed therefore, that an employer is not liable where the servant's injury was not caused by any defect in the appliance which affected its safety when it was used in the ordinary manner and for the purposes for which it was intended." 3 LaBatt on Master & Servant (2 Ed.), section 921.

The master is not obligated to keep a building in a safe condition at every moment of the work. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not obligate him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants." *Armour* v. *Hahn*, 111 U. S. 313.

8. An employee voluntarily accepting employment with knowledge of conditions, and without obligation, even assumes the risks of insufficient lighting. "A carpenter assumed the risk of injury arising from insufficient lighting where he was required to work, where he entered upon the work without objection. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Skinner*, 136 S. W. 644. In this case it is established by the evidence that the lighting was sufficient.

9. Plaintiff knew the condition, and appreciated the danger, therefore assumed the risk, and cannot recover. "An experienced employee, admittedly knowing the material conditions and presence of a pile of cinders who

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attempts to board a moving engine with a vessel of water in his hand, must be considered as appreciating the danger and assuming the risk although at the time he may have forgotten the existence of the cinders; and this is so, even if the employer was negligent in allowing the cinders to remain. There being no violation of any safety statute, the common-law defense of assumption of risk is not eliminated in such a cause by the Employer's Liability Act." *Jacobs* v. *Railroad Company,* 241 U. S. 244.

The plaintiff, "an experienced employee, admittedly knowing the material conditions" assumed the risk.

10. The court erred in restricting the number of instructions. "It is the right of the parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake. And it is the duty of the judge, when requested, to give in charge any requested instruction which is correct as a proposition of law and applicable to the issues." 11 Enc. Pl. & Prac. 213. "The parties have a right to indicate, by written requests, the points upon which they respectively desire the jury to be informed as to the law." *Archer et al.* v. *Sinclair et al.*, 49 Miss. 343, sec. 793, Code 1906, Hemingway's Code, sec. 577.

11. Even if liability could have been established which is denied, the verdict is grossly excessive. Plaintiff was not permanently injured, and only lost seven days. He worked more than a year after receiving the injury, performing the same work, drawing more pay, and worked frequently overtime. He resigned on account of drunkenness and then sued for the alleged injury.

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A. Vick Robinson and *Anderson, Voller & Kelly,* for appellee.

The duty of the master in cases similar to the case at bar, has been defined by the supreme court of the United States in *Union Pacific* v. *O'Brien,* 40 Law. Ed. 771, as follows: "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe material and structures in the construction of its road and appurtenances, and if, from a defective construction thereof, an injury happened to one of its servants the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from the defects incident to the service but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures, including sufficent culverts for the escape of water collected and accumulated by its embankments and excavations." But counsel say plaintiff had used the switch numerous times that night; had gone in on the switch track immediately before he was injured. We repeat what we have already said, there is no testimony to show that plaintiff had touched the switch, either that he did or did not, and we say that if he had thrown the switch fifty times that night and the switch lamp was burning, it is all the greater reason for his assuming that it was still burning and indicated the switch stand when he came out of number six switch.

As to counsel's contention that if the light was out the defendant had no notice of it, we answer Grayson had knowledge of the condition of that switch lamp. According to his testimony he was charged with the duty and responsibility of ascertaining the condition of

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these lamps and keeping them in fit and proper shape. When Grayson inspected this lamp a few hours before this injury he necessarily found the condition of the switch lamp and found that it did not have enough oil in it to run through the night, if indeed it had any at all. If Grayson did not inspect it, he failed to perform his duty and we pass this over with the observation that switch lamps went out from a variety of causes and even attempt to leave the impression with the jury that the oil was stolen from this lamp. Unfortunately for this view there is no testimony and the court excluded this naked and unsupported hypothesis. In the case of *Brown* v. *Y. & M. V. R. R. Co.*, 41 So. 383, this court said: "The court will not go beyond the case shown to imagine that the trouble might have been from an unforeseen cause, such as a freshet, storm, felonious tampering with the rails, "etc."

We deny that plaintiff was the first person to ascertain the defective condition of the lamp. It may be true, as we have stated already, that plaintiff was the first person to discover light being out; this was but evidence of the unfitness and improper condition of the switch lamp and was but the natural effect of an antecedent cause and that cause was Grayson's failure to inspect and put the lamp in fit and proper shape.

So we say that the master had full knowledge of the condition of this lamp and if we are in error as to this we say that failure to have the knowledge that an inspection would disclose is equally culpable and defendant is liable in either event. It matters not which horn of the dilemma is taken, defendant is impaled and cannot escape.

We are in perfect accord with the cases of *Railroad Co.* v. *Barrett*, 166 U. S. 617; *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480; *Hough* v. *R. P. R. R. Co.*, 100 U. S. 218" (and other cases cited). Counsel cite the case of *Hooper* v. *Railroad Co.*, 60, 98 Miss. 82. In this

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case a brakeman, whie engaged in making a coupling on a car in attempting to withdraw his hand, caught his glove in a sliver of steel that had been broken off and projected down from under the side of the link and his hand was crushed. The court said in its opinion on page 829, which is cited by opposing counsel that:

"In the case at bar no attempt was made to show actual knowledge on the part of the master. In order to show constructive knowledge, it is necessary for appellant to show, not only that the defect could have been discovered by a reasonably careful inspection of the link but the master had an opportunity, in the exercise of reasonable diligence to have made such an inspection. In order to show that the master had such an opportunity for inspection, it was necessary for him to show either that the defect in the link existed at the time it was furnished by the master, or, in event it became defective after it was so furnished, that the defect had been in existence for a length of time sufficient to have afforded appellee, in the exercise of reasonable diligence, and opportunity to inspect it. Both of these facts can of course, be established by circumstantial evidence in the same manner that any fact may be so established."

According to defendant's own witness, Grayson, he both had the opportunity to and did inspect this lamp less than twenty-four hours before the injury and according to his testimony he would necessarily have ascertained the condition of this lamp that it did not have sufficient oil to run through the night. Therefore we say, in the language of Judge SMITH in the Hope case:

"The defect had been in existence for a length of time sufficient to have afforded the railroad company, in the exercise of reasonable diligence an opportunity to inspect it." *Miss. Central Co.* v. *Bennett,* 111 Miss.

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163; *Lumber Co.* v. *Garner,* 11 Miss. 814, and *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, are all in accord with the Hope case just considered and relate to the necessity of notice or opportunity for notice of the defects.

Counsel cite case of *Armour* v. *Hahn,* 111 U. S. 313, on the proposition that the master must furnish reasonably safe structures and places for his servants to work. This case has no possible application to the intant case, as in that case, Hahn was, himself, engaged and employed in erecting the building, and its safety depended upon him and his fellow employees.

Plaintiff did not assume the risk.—Plaintiff did not assume the risk under the facts in this case. *North Pac. Co.* v. *Everett,* 38 La. Ed. 373; *Gila, etc., Co.* v. *Hall,* 58 Law. Ed. 524; *Vickery* v. *N., etc., Co.,* 89 Atl. 277. When and under what conditions does an employee engaged in interstate commerce, and whose case therefore is referable to Federal Employers' Liability Act, assume the risk of his employment? Under this statute the employee, so far as the assumption of risk is concerned is in the same attitude that he would be in a case where the common-law doctrine of assumption of risk is relied on, excepting those cases where Safety Appliance Acts are violated. The leading case in this country since the enactment of this Federal Employer's Liability Statute is the case of *Seaboard Air Line R. R. Co.* v. *Horton,* 223 U. S. 492, 58 Law. Ed. 1062, which case is referred to in the brief of opposing counsel. There are a number of cases decided by the supreme court of the United States both prior and subsequent to the enactment of the statute, which relate to assumption of risk and we will set out some of these cases later on in this discussion.

1. Was plaintiff injured by defendant's negligence?
2. If so, did plaintiff assume the risk of negligence?

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3. Did plaintiff by his own negligence contribute to his injury?

To these inquiries an affirmative answer was given by the jury as to the first and third questions but the jury decided that the plaintiff did not assume the risk of injury. It seems that the jury were incorrectly instructed, in the respect that the defendant was held to absolute responsibility in furnishing safe instrumentality, without regard to reasonable care. The court through Judge PITNEY, held:

"The distinction between assumption of risk and contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even if the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workmen, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These, the employee, is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that

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an ordinary prudent person under the circumstances would have observed and appreciated them. Citing: *Choctaw, etc., Co.* v. *McDade,* 48 Law Ed. 96; *Schlemner* v. *Buffalo Co.,* 55 Law Ed. 596; *Texas, etc., Co.* v. *Harvey,* 57 Law Ed. 582; *Gila Valley, etc., Co.* v. *Hall,* 232 U. S. 94.

Continuing: "When the employee does know of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representatives an assurance that the defect will be remedied, the employees assumes the risk even though it arises out of the master's breach of duty." *Yazoo & Mississippi Valley R. R. Co.* v. *Wright,* 59 Law Ed. 277.

Another case which we think is illuminating on the same point is *Illinois Central R. R. Co.* v. *Porter,* 207 Fed. 313. The denial of a motion for directed verdict is assigned as error, on the ground that the risk which resulted in decedent's injuries was the usual and ordinary risk incident to the method of employment, and that the assumption of such risk is not abrogated by the Federal Employers' Liability Act. There was no error in refusing a peremptory instruction. In *So. Ry. Co.* v. *Gadd,* 207 Fed. 277, we held that even at common law the employee did not assume the risk of the employers' negligence from an unusual and unexpected method of operation, that is to say not incidental to the ordinary method. Evidence that the work was being done at the time in question in the usual and ordinary way was not evidence that negligent conduct such as charged in this case was the usual and ordinary method of doing the business. The natural inference would be that such negligence of a fellow trucker was outside the usual and expected. The risk of such negligence was not, in our opinion, assumed by decedent, and this without reference to any construction

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of the Employer's Liability Act. The defendant's requests based upon the theory of such assumption of risk, were, we think, properly refused as not supported by a proper construction of the testimony in that respect.'' *Union P. R. R. Co.* v. *O'Brien,* 40 Law Ed. 766; *Rowland* v. *Chicago, etc., Co.,* 135 N. W. 156; *T. & P. Ry. Co.* v. *Archbald,* 42 Law Ed.; See, also, *T. & P. Ry. Co.* v. *Behymer,* 47 Law Ed. 905; *Gentzkow* v. *Portland Ry. Co.,* 102 Pac. 614. Counsel cite the case of *Baltimore & Ohio Railroad Co.* v. *Randle,* 109, U. S. 478, 27 Law Ed. 1003. We find however on examination of this case that the facts are entirely dissimilar.

The case of *Y. & M. V. R. R. Co.* v. *Mullins,* decided in 1919, by United States supreme court, cited by Counsel announces a well-known principle of law which we are frank to concede but has no application to the facts in the instant case. Counsel cite *Butler* v. *Frazee,* 211 U. S. 459, 53 Law Ed. 281. The court said in this case: "But when the conditions are constant and of long standing and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court."

Much stress is laid by counsel on page 28 of the brief on *Jacobs* v. *Railroad Co.,* 241 U. S. 229. The Jacobs case presents a very different state of facts from the case at bar. But counsel argue on page 31 of their brief that: "Plaintiff assumed the risk of any insufficient lighting for he was thoroughly familiar with all conditions in the yards and knew that switch lights would occasionally become extinct, and cite 4 Labatt on Master and Servant, section 1352 in support of this contention.

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We do not think that the testimony in this case establishes such a frequency of happening of switch lights being unlighted as to constitute "a normal incident of the employment," but rather in the language of counsel that "the switch lights would occasionally become extinct."

Labatt on page 3782 of same work in further considering this principle says: "Such a principle obviously has no application to cases in which it is shown that conditions like those which caused the injury, were as a matter fact, exceptional rather than normal." The case of *I. C. R. R. Co.* v. *Swisher*, 61 Ill. App. 611, cited in counsel's brief in the note to the foregoing section of Labatt's, presents a very different situation from the one at bar. The fireman in the Swisher case knew of this general condition, viz; that lamps were not supplied for switches, though his knowledge did not relate to or extend to a particular switch and he had no opportunity to observe the particular switch and the court held he assumed the risk of using this particular switch. In the case at bar the conditions are reversed, plaintiff knew of this general condition, viz: that all switch stands were equipped with lamps and these lamps were kept burning at night, except in those occasional instances where the lamps went out, that the safe and successful operation of defendant's trains on those switches required that the lamps be kept burning at night.

The case of *Kirbo* v. *So. Ry.*, 89 S. E., cited by counsel, we think peculiarly applicable to the case at bar. The facts sufficiently appear from that part of the opinion which we deem pertinent and shall set out:

"Bearing in mind these rulings, this court, in its former decision of this case (16. Ga. App. 49, 84 S. E. 491), held that the jury should be allowed to pass upon whether or not the employee, after discovering the insufficiency of light, assumed an extra risk by under-

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taking to perform his duties as a switchman. We held that this would be a question of fact for determination by a jury (assuming from the allegations in the petition that lights were burning when the plaintiff began to work), and that the question whether he assumed the extra care due to performing his dangerous duties in darkness or imperfect light would depend on how long the darkness or insufficient illumination existed immediately prior to the injury and upon the discovery of the insufficiency of the light was first made by him, and also upon his location at the time the light failed, and whether, under the exigencies of the situation, it was then possible for him to remove himself from the danger zone to a place of safety, or whether he was necessarily so engrossed in the efficient and proper discharge of his duties as to render him oblivious to a partial failure of the light."

We will not undertake to set out the remainder of this opinion but that part we have cited supports fully plaintiff's contention in the case at bar.

As to counsel's seventh proposition: "Defendant was not obligated to keep the switch lighted at every moment during the night."

The case of *Armour* v. *Hahn,* cited by counsel to sustain this position has reference to a stituation where the instrumentality of place is constantly changing its form, where a building is being constructed and the construction work being committed to the responsibility of the injured party and his fellow servants. This rule is both rational and just and any other would impose a hardship upon the master and make him an insurer, which under the law he is not. We have already discussed this authority.

Counsel says on page 41: "The unlighted switch lamp is not the proximate or even the remote cause of plaintiff's injury.

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As we undertand the law relating to proximate cause this is generally a question of fact for determination by the jury. Counsel are here confusing again the question of contributory negligence with that of assumption of risk.

Again they say: "If plaintiff had used this light for the purpose it was intended to be used, he could have seen the switch stand several feet away." If this be true, and we do not at all concede that the duty devolved upon plaintiff to go around with a little hand signal lantern looking for obstructions, in the natural area of his operations, his failure to do this at this time would only constitute contributory negligence on his part and this would only operate to diminish the amount of damages under the Federal Employer's Liability Statute.

Again they say: "Even without a lantern or a light it was not so dark that he could not see the switch stand, when he was ten or fifteen feet from it immediately before he jumped from the side of the car."

And the plaintiff himself testified on page 47 that it was so dark that he did not see the switch. On page 102 he testified the little hand lantern did not throw sufficient light for him to see the switch; that if it had, he would not have run into it.

We deny counsel's statement that: "Plantiffs own evidence shows that he could see switch stand without any light ten or fifteen feet away." His testimony is just to the opposite effect. Counsel says: "The duty of the defendant was simply to see that the switch stand was reasonably safe for the purpose it was erected and used, that is to indicate by the lights when the switch was open and when it was closed." And further: "The master's obligation to furnish reasonably safe and suitable instrumentalities is limited by the use for which the instrumentalites are designed," citing 3 LaBatt on Master and Servant, section 921.

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We will not set out the entire section quoted in Counsel's brief, but direct the attention of the court to the same authority and same section. In the case of *Morrison* v. *Burgess, etc., Co.*, 47 Atl. 412, cited by counsel, the principle is illustrated; the court said in the course of its opinion: "The case does not show either that the defendants intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. A person is not in fault for not knowing particular facts, unless circumstances exist which would put a man of average prudence upon inquiry.

And no such circumstances were shown. If the jury had found that the defendants ought to have known that he would use it, they could then say a trap was set for him when the defendants left the gutter as they did; for that would be finding that they suffered a dangerous situation to exist upon a part of their premises which they knew their servants were accustomed to use in their work."

We wish to say further in this contention, however, that it is plainly evident from the testimony in this record that the purpose of the switch light was likewise for the safety of the men engaged in the service of the defendant in and around it. We submit that a fair consideration of the testimony of the witnesses for plaintiff and defendant, establishes the fact that the safety of the men required that those switch lamps be kept burning in the nighttime.

Instruction Number 1: "The court instructs the jury for the plaintiff that if you believe from the testimony in this case that the defendant company negligently failed to have the switch light at number six switch lighted on the morning of September 14th, 1917, and further believe from the evidence that because of such failure on the part of the defendant to have such switch lamp lighted and as a proximate and direct

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result thereof plaintiff was injured unless he knew of the condition or by the use of ordinary diligence could have known of the danger before he was injured, then you will find for the plaintiff and assess his damages in such sum as you believe the evidence justifies, not to exceed the sum sued for."

Instruction Number 2: "The court instructs the jury for the plaintiff that the plaintiff in this case only assumed the ordinary and customary dangers incident to his employment and the court charges the jury that the plaintiff did not assume any risk arising from the negligence of the defendant, if you believe from the testimony that the defendant was negligent, unless he knew of the condition, or by the use of ordinary diligence could have known of the danger before he was injured."

The following instructions were granted the defendant: Instruction number one (1) granted defendant is as follows: "The court instructs the jury for the defendant that the defendant can only be held responsible to Dees for injuries received through its negligence, and the burden of proving such negligence is upon Dees to the same extent that it is upon any other plaintiff seeking to recover on the ground of negligence. Before the plaintiff can recover from the defendant by reason of the fact that switch number six was not lighted the burden of proof is on him to show that the defendant knew or could have known of the existence of the fact that said lamp was not lighted, if such was a fact, and unless the plaintiff, Dees, had shown by a preponderance of the evidence that the defendant knew, or could have known by the exercise of reasonable diligence, that the lamp in question was not lighted at the time Dees claims to have received his injuries, then it is the duty of the jury to find for the defendant."

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Instruction Number Two (2) granted defendant is is as follows: "The court instructs the jury for the defendant that, if they believe from the evidence that the lamp on number six switch was inspected on the evening before the plaintiff claims to have been injured, by a suitable and competent inspector and was found to be in perfect condition and was properly lighted, and that within a short time before plaintiff claims to have been injured something unknown and unforeseen had caused the light in said switch to go out, then the defendant would not be guilty of negligence as it would have exercised due diligence for the purpose of ascertaining whether the lamp was in reasonably good order for the purpose for which it was being used. If the defendant exercised such diligence as any ordinarily reasonable man would exercise in matters of that kind then it is not liable. The defendant was not an insurer of the plaintiff, Dees, regardless of its own diligence. All the law required of defendant with reference to keeping said lamp in reasonbly good repair for the purpose for which it was being used, was to exercise ordinary care and diligence to see that it was in good and proper order and use such diligence as a reasonably careful and prudent man would use under the circumstances. If defendant did this and the lamp on said switch from any cause "went out" then the defendant is not liable as the plaintiff assumed the risks of such hazards if any there were, and if the jury so believe from the evidence they will find for the defendant."

Instruction number three (3) granted defendant is as follows: "The court instructs the jury for the defendant that negligence by the railroad company is essential before the plaintiff is entitled to recover, even as much as one cent. In the operation of a railroad absolute safety is unattainable and the defendant railroad in this case was not an insurer of the safety of plaintiff while he was engaged in switching cars in

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the yards. Negligence is the failure to do what a resonable and prudent person would ordinarily have done under the circumstances of the situation, or doing that which such a person under the existing circumstances would not have done. Negligence always has relation to the circumstances in which one is placed and what an ordinarily prudent man would do or omit to do in such circumstances. Wherefore, unless you believe from a preponderance of the evidence that plaintiff Dees, has shown that the defendant failed to exercise ordinary care to furnish a reasonably safe place for the plaintiff to perform his duties, as under like conditions others engaged in similar or well regulated business are in the habit of furnishing the defendant railroad company is not liable."

Instruction number four (4) which was granted defendant is as follows: "The court instructs the jury for the defendant that when the plaintiff, Dees, entered the service of the defendant he assumed the extraordinary risks incident to his employment, if such risks there were, or risks caused by the defendant's negligence, if any, which were obvious or fully known and appreciated by him. Therefore, if they believe from the evidence that the defendant negligently failed to light said lamp on switch number six and that the plaintiff knew or could have known, by the exercise of reasonable diligence the location of said switch and that it was not lighted, then he assumed the risk of such danger, and if he was injured thereby the verdct of the jury will be for the defendant."

Instruction number five (5) which was granted the defendant is as follows: "The court instructs the jury for the defendant that it was the duty of the plaintiff in conducting his work to exercise reasonable care to avoid injuries to himself. He was under a great obligation to provide for his own safety from such dangers as were known to him, or such as were dis-

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cernable by ordinary care on his part, as the defendant was to provide a reasonably safe place for him to work. He should have taken ordinary care to learn of the dangers which were likely to beset him in the switching service in which he was engaged. He had no right to alight from a train in a place which he knew was dangerous or unsafe or which he might have known was dangerous or unsafe by the exercise of reasonable diligence. Therefore, if you believe from the evidence that the plaintiff knew or could have known by the exercise of reasonable care and caution could have known that said switch was there unlighted and that he would probably strike said switch stand, and was injured thereby, then the defendant is not liable as the plaintiff assumed the risk of such injury."

It will be seen upon a reading of these instructions granted the plaintiff and defendant that the defendant was granted instructions more liberal than they were entitled to under the law.

As to the court's action in refusing to consider defendant's instructions "A," "B," "C," "D," "E," "F," "G," "H," and "I," set out in defendant's special bill of exceptions, on page 10 et seq: This ruling of the trial judge was harmless error: 1st. Because the defendant had already been granted instructions fully and fairly presenting its defense. 2nd. Instructions "A," "E," "F," "G," and "H," are covered in the instruction granted the defendant and are but repetition. 3rd. Instructions "B," "C," "D," and "I," do not announce correct principles of law; are not accurate statements of the law of negligence as applied to this case.

We submit that the testimony that what we have set out in details hereinbefore establishes that the use the plaintiff was putting the switch lamp to was the natural and logical use that a switchman so situated

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would put it to. As to counsel's citation of LaBatt, Vol. 3, page 2457, we wish to say that the general principle announced on this page has the limitations imposed upon it by the distinguished author that will be found on page 2462 which is a continuation of the same section, to-wit: 921.

As to counsel's criticism of plaintiff's instruction number 2 counsel confuse ordinary and extraordinary risks incident to employment. We feel that this instruction is not in conflict with any of the authorities cited. This criticism, however, is hypercritical as any error whatever in the announcement as to ordinary and customary dangers is cured by the statement in the instruction that the plaintiff would assume the risk arising from the negligence of the defendant either if he knew of that negligent condition or by the use of ordinary diligence could have known of the danger before he was injured. See *Boldt* v. *Ry. Co.*, 245 U. S. 441.

As to counsel's contention that: "Verdict of the jury grossly excessive. Jury influenced by prejudice, passion and irrelevant and incompetent evidence and the remarks of the judge with reference to his inflexible rule relating to the number of instructions to be given."

The testimony in this case shows that the plaintiff suffered what is technically known as a double hernia or what is generally known as a rupture on both sides, and that he received this injury as the result of defendant's negligence. Plaintiff's testimony was to the effect that he has suffered a great deal on account of this injury and suffers yet, that it has been necessary for him to wear a truss which confines the hernia on each side. The testimony further shows that the plaintiff was confined to his bed some eight or ten days and that after he became able to get out, that he undertook again his duties in defendant's yards,

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and that he was able to perform that part of his duties which called for physical exertion and effort only by the assistance of his fellow workers; that he was unable again to do any heavy work. The surgeon who testified as to plaintiff's condition, testified, that hernias are serious conditions, that they are permanent without operation, that an operation does not always remove the condition, though in a majority of cases it does; that an operation would probably entail danger to his life and that there is no chance for plaintiff's recovery without operation; that his condition would be a drawback in doing work and the testimony now shows that plaintiff is unable to do work requiring much physical effort. We deny the imputation that the jury that assessed plaintiff's damages was actuated either by passion or prejudice or influenced by the remarks of the court with reference to the limitation upon the instructions.

Wherefore we say in conclusion that the verdict of the jury is supported by the testimony and is commensurate with the injury, and should accordingly, be affirmed by this honorable court, and the judgment based upon it should be affirmed by this honorable court.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a judgment for damages alleged to have been sustained by the appellee while in the employ of the appellant by reason of its negligence.

In September, 1914, and for some years prior thereto, the appellee was in the appellant's employ as an engine foreman in the appellant's yard at Vicksburg, charged with the duty of "making up all trains . . . that had to be switched in the Vicksburg yards." There are fifty-two switch tracks in this yard, each controlled by a lever extending from the track to a switch stand about six feet therefrom. On the top of each

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of these stands is an oil lamp. These switch stands, including the lamps on the top thereof, are about three feet high. The lamps which burn oil are inspected each day by an employee of the appellant whose duty it is to keep them filled with oil and burning. Two of the opposite sides of each lamp are of green glass, and two are of red, so that on two sides the light therefrom appears green, and on the other two red, indicating according to the direction in which they are turned whether the switch is open or closed.

The appellee is an expert switchman, was familiar with the appellant's yard, and knew the location of each switch therein. On the early morning of September 14, 1917, while it was yet dark, he stepped off of a slowly moving car of an interstate train which his crew was then engaged in switching in order to signal the engineer, and, after taking about two steps, fell over the stand of switch No. 6, the lamp of which was not burning, and was injured. The appellee passed this switch stand a short time before he was injured, and the lamp thereon was then burning, though this fact seems not to have attracted his attention; the switch having been turned by another member of the crew.

The employee of the appellant in charge of the switch lamps testified that he inspected, filled, and lighted the lamp of switch No. 6 the day before the appellee was injured. One of the members of appellee's switch crew testified that he examined this lamp immediately after appellee fell over it, and that it had no oil in it. The appellee had a small lighted lantern at the time he was injured, but stated that he was not using it to locate the switch stand, but was intending to use it in signaling the engineer, and that his failure to see the switch stand was caused by the absence of the light which should have been burning thereon. There was evidence, and the appellee admitted, that these switch

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lamps would occasionally go out without fault on the part of the appellant or of the person in charge thereof, and that when the going out of a lamp attracted the attention of a member of the switching crew he would relight it both for his own protection and that of the appellant.

At the close of the evidence, the presiding judge announced that all of the issues involved in the case could be set forth in not exceeding eight instructions for each side, and that he would not consider a greater number if tendered him. He passed on eight instructions, in addition to a request for a peremptory instruction, tendered him by the appellant, but declined over the appellant's objection to consider several other instructions tendered him by it, which instructions were afterwards embodied in a bill of exceptions.

The errors assigned bring under review: (1) The refusal of the appellant's request for a peremptory instruction; (2) the granting of the appellee's first and second instructions: (3) the refusal of the appellant's sixth, seventh, and eighth instructions; (4) the refusal of the court below to pass on more than eight instructions tendered by the appellant; and (5) the amount of the verdict.

First. The ground on which the appellant sought to obtain a peremptory instruction is that the going out of the switch light was one of the ordinary risks of the services in which the appellee was engaged, and consequently was assumed by him when he entered the appellant's employ.

The risks which a servant may incur in any employment fall naturally into one or the other of two classes: First, the ordinary risks of the service, that is, those which are not created by the master's negligence and which remain after he has used due care to remove them; and, second, the extraordinary risks or those which are created by the master's negligence.

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It is probably a universal rule that the servant merely by entering the service of the master assumes the ordinary risks of the service, and if he is injured solely because of them he cannot recover. But at common law, and under the federal Employers' Liability Act (U. S. Comp. St. sections 8657-8665), which controls here, risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master. In the case at bar, the appellee assumed the risk of the switch lamps going out without fault on the part of the appellant; but his complaint here is, and the jury believed, that the lamp of the switch stand over which he fell went out because the appellant's employee in charge thereof negligently failed to keep it filed with oil, so that the question of whether or not the appellee assumed the risk thereof cannot arise unless he had, before he was injured, either actual or constructive knowledge of the fact that the lamp was out, and whether he had this knowledge, construing the evidence most strongly for the appellant, was a question for the determination of the jury. The request by the appellee for a peremptory instruction was properly refused. *Seaboard Air Line Railroad* v. *Horton*, 233 U. S., 492, 34 Sup. Ct., 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

Second. The appellee's instruction No. 1 is as follows: "The court instructs the jury for the plaintiff that if you believe from the testimony in this case that the defendant company negligently failed to have the switch light at No. 6 switch lighted on the morning of September 14, 1917, and further believe from the evidence that because of such failure on the part of the defendant to have such switch lamp lighted and as a proximate and direct result thereof plaintiff was injured, unless he knew of this condition, or by the use of

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ordinary diligence could have known of the danger before he was injured, then you find for the plaintiff and assess his damages in such sum as you believe the evidence justifies, not to exceed the sum sued for."

The appellant's objection thereto is that it violates the rule "that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed," for the reason that the lights were placed on the switch stand by the appellant, not for the purpose of enabling its employees to locate the switch stands, but for the purpose of indicating whether the switches were open or closed.

One answer to this contention, assuming for the purpose of the argument that the use for which these lights were intended by the appellant is material, is that, while it may be that the primary purpose for which the lights were placed on the switch stands was to indicate whether the switches are open or closed, it appears also from the evidence that this was not the sole purpose they were intended to serve, but another was that the location of the switch stands might thereby be disclosed to the appellant's employees at work in the yard.

But the use for which these lights were intended by the appellant is not here controlling. The appellant's switching crews in the discharge of their duty must necessarily walk between the tracks in its yard, so that it was the duty of the appellant to exercise reasonable care to keep the space between these tracks reasonably safe for that purpose. These switch stands unmarked by lights would undoubtedly be a menace to the safety of these switchmen on dark nights, because of their liability to fall over them as did the appellee in the case at bar, though it may be that if they had never been marked by lights their presence between the tracks would only have added to the care which the switchman must observe in walking between the tracks at night, as to

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which we are not now called upon to express an opinion, for the obstructions which the appellant placed between the tracks were not mere switch stands, but switch stands on which there were lights which it proposed to keep constantly burning and to avoid which less care was required on the part of its employes than would have been rquired of them to avoid unlighted switch stands. The lights were integral parts of the switch stands, and the appellant's employees would naturally associate one with the other and trust to the lights in locating and avoiding the switch stand. The placing of the lights on these switch stands by the appellant whatever its primary purpose in so doing may have been, was in effect an invitaton to its employees to use them for the purpose of locating and avoiding the switch stands, a use for which they were suitable and to which from their very nature the appellant must have known its employees would put them. It follows, therefore, that the appellant by placing the lights on the switch stands became charged with the duty of exercising reasonable care to keep them burning, so that its employees would not be misled by their absence in locating and avoiding the switch stands.

The appellee's instruction No. 2 is in accord with our views of the law as hereinbefore set forth in discussing the appellant's request for a peremptory instruction, and is therefore correct.

Third. The appellant's instruction No. 6 was properly refused, one sufficient reason therefor being that it was sought thereby to charge the jury, when the law is to the contrary, that an employee assumes a risk created by his employer's negligence merely because he had as good an opportunity as his employer of knowing of its existence.

No error was committed in refusing the appellant's instruction No. 7, for the substance thereof was given in charge to the jury over and over again for both

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sides; that is, that a recovery by the appellee depended upon his having fallen over the switch stand because the lamp thereon was not lighted.

The appellant's instruction No. 8, was also properly refused because of the erroneous charge therein that—If the plaintiff "had been working in the yards where such switch was located and knew that such switch stand No. 6 was there and had known if for years prior to the alleged accident, then plaintiff assumed the risk of such danger, if any there was from said unlighted switch."

The appellee admitted knowing the location of all of the switches, but the trouble here is that he fell over the switch stand in the dark not knowing that he was then in its vicinity, which fact would have been disclosed to him had the lamp been burning.

Fourth. Trial courts are required to, and should only, grant instructions sufficient in number and character to guide the jury in determining the issues involved in the case on trial, and they have the right to limit the number of instructions to be considered by them accordingly. *Mabry* v. *State,* 71 Miss. 716, 14 So. 267; *Waldrop* v. *State,* 98 Miss. 567, 54 So. 66. This number cannot be an arbitrary one applicable to all cases alike, but must depend in each case upon the number of issues therein involved. In the case at bar the five instructions granted the appellant fully covered all of the issues it was entited to have submitted to the jury; consequently, the court committed no error in declining to pass on the others tendered to it.

Fifth. The appellee, as a result of his injury, is suffering from a double hernia which will be permanent unless relieved by an operation which may or may not be a success, and which, according to the evidence, will be attended with danger to life. He is still suffering pain at intervals, is compelled to wear a truss with

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its accompanying inconvenience and his capacity for work has been materially reduced. The verdict of fifteen thousand dollars which is claimed by the appellant to be excessive, is large; but on the evidence we cannot safely say that it was the result of passion, prejudice, or corruption on the part of the jury.

Affirmed.

ILLINOIS CENTRAL R. Co. v. THREE FOOT BROS. & Co.

[83 South. 635, In Blanc. No. 20468.]

1. EVIDENCE. *Books of railroad company.*
   In a suit against a railroad company for cotton destroyed by fire while in its possession as carrier, it was error to exclude the books of the railroad company which tended to show that the cotton was delivered before the fire to a compress company according to custom and a bill of lading which constituted the compress company the agent of the shipper to receive shipment.
2. APPEAL AND ERROR. *Review. Truth of evidence.*
   The supreme court on appeal will accept as true evidence for the defendant which the trial judge improperly excluded and then directed a verdict for the plaintiff.
3. CARRIERS. *Freight. Destruction by fire. Peremptory instruction.*
   In a suit against a railroad company for the value of cotton destroyed by fire while in its possession as a carrier; where the evidence tended to show that the cotton had been delivered to a compress company, the shipper's agent to accept delivery, before the cotton was burned, it was error to give a peremptory instruction for the plaintiff, shipper.

APPEAL from the circuit court of Marshall county. HON. J. L. BATES, Judge.

Suit by Threefoot Bros. & Co. against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

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Wells, May & Sanders, for appellant.

First: Does the evidence show that the cotton was delivered to the compress company? Second: If the cotton was delivered, can the appellant be held liable for its destruction by the compress fire? (1) The record is short and we believe no good purpose can be subserved by copying excerpts from the testimony of the witnesses. We believe that a fair examination of the testimony, however, will disclose unmistakably, that the cotton in question arrived at Holly Springs, and was delivered by the railroad company, according to the bill of lading, that is, to the compress company, in whose care it was consigned. The testimony of the witnesses leaves no room for doubt, that the long established custom, as well as the contract between the compress company and the railroad company, made delivery of the cotton to the side track of the compress company delivery to the compress. The compress manager testified to this, and that he received notice of the cotton being delivered. The railroad agent, Pinkston, testified that certain records, which were books of original entries in his office showed the arrival of the cotton at Holly Springs, and the delivery thereof to the compress company. He also testified to this from his original independent recollection, and moreover produced the books showing the signature of the manager of the compress company receipting for this cotton. While the railroad agent did not make the entries himself, he says they were entries in books of original entry regularly and properly kept in his office, under his supervision made at the time of the transaction in question. In other words, everything was shown in reference to the keeping of these books, which this court said in *Railroad Company* v. *Provine,* 61 Miss. 288, was necessary to be shown to predicate the introduction of such books. In the

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Provine case the necessary facts were not shown to warrant the introduction of the books which were offered in that case, but the court said that if such testimony had been offered or given, showing the regularity of the keeping of the books, etc., that they would have been admissible at the suit of a shipper of cotton to charge the railroad company with the receipt of the cotton. If such testimony would be good in the case of shipper against the railroad to show delivery to the railroad, it would be equally good to show delivery by the railroad company to the consignee and thus relieve the railroad company of liability. But as we have shown the delivery of the cotton was established otherwise, than by the books. It was shown by the railroad company to the consignee and thus relieved the Railroad Company of liability. But as we have shown the delivery of the cotton was established otherwise than by the books. It was shown by the testimony of Hammon, that he had notice of the arrival of the cotton, by his signature to the books, which Pinston testified to, showing of Pinkston to the effct, that he personally remembers that the actual cars and cotton as entered on the books by his surbordinates were placed on the tracks of the compress company. This was certainly sufficient to carry the case to the jury on the question of delivery of the cotton, if delivery on a side track in a car constituted a delivery. And that brings us to the next question in the case. Before proceeding to discuss that question, however, we call the court's attention to the following cases on the question of the admissibility of books of original entry in various kinds of cases without the personal testimony of the party making the entries. *Post* v. *Kennerson,* 52 L. R. A. in the Note page 590; *West Virginia Architect & Builders* v. *Stewart,* 39 L. R. A. (N. S.) 899. (2) The liability of a carrier, as such on a contract of carriage ceases

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on delivery, and delivery is complete when car is placed on side track at disposition of the consignee. *Brennfleck* v. *M. & O. R. R. Co.*, 63 So. 954, (Ala.).

Delivery of a carload shipment of goods is complete when the carier has placed the car upon a side track for unloading by the consignee and an agent of the latter, after verifying the goods in the car, has signed and delivered to the carrier a receipt in full therefor previous to unloading. *Kennedy & Co.* v. *Atl., etc., R. R. Co.*, 122 Ga. 365, 50 S. E. 132.

A delivery of the contents of a car by the carrier to the consignee is effected by placing car on delivery track. *Rothschild* v. *N. Pac. R. R. Co.*, 40 L. R. A. (N. S.) 773, and monographic note thereto. For a full statement of the rule in such cases, see 4 R. C. L., section 279, subject "carriers" page 824: See also *Greggs* v. *Illinois Central Railroad Co.*, 37 Am. State Reports, page 238, and note thereto.

The authorities quoted abundantly establish the rule that in case of special contract of carriage or in accordance with customs, if a carload of bulky freight is placed on a delivery or side track, and the consignee notified, the delivery is complete and the liability of the carrier as such ceases. The facts in this case, we respectfully submit, bring this case squarely within that rule. Here the cotton was delivered to compress on its side track, and the compress notified and afterwards the cotton was destroyed by a fire originating in the compress company, and through no fault of the railroad company. The shipper of the cotton made the compress company its agent to receive the cotton by consigning the cotton to the care of the compress company, and when the cotton was delivered to this agent the contract of carriage was complete, and the liability of the carrier on the contract ceased.

We, therefore, respectfully submit that it was error for the court to exclude the evidence of the witnesses

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Pinkston and Smith, and it was error to give the peremptory instruction for the plaintiff. Had the evidence of the defendant not been improperly excluded, the defendant would have been entitled to a peremptory instruction.

We respectfully submit the judgment of the court below ought to be reversed.

Lester G. Fant, for appellee.

The first assignment of error is that the trial court erred in excluding the testimony of witness Pinkston The court simply followed in excluding this, the long line of decisions in Mississippi that have started with *Railroad Company* v. *Provine*, 61 Miss. 288, and the case of *Wooten* v. *The Railroad Company*, 98 Miss. 322. The facts in this Wooten case are absolutely on all fours with the facts in the case at bar. All the records that were attempted to be proven were made by Ollie Quiggins, who at the time of the trial according to the record, was living in Memphis, forty-five miles from the place of trial, and Roderick McDermott who at that time was in training camp in the East. No effort was made to take their deposition, nor to have them present at the trial. In quoting from the statement of facts at page 323 of the 89th Miss. we find the following:

"Over the objection of appellant, appellee was allowed to introduce in evidence its interchange records kept by it in its Meridian office which showed that the car was, upon its arrival at Meridian, promptly placed on appellee's interchange track and billing therefor delivered to the connecting carrier. Appellee's clerk at its Meridian office, as a witness over objections of appellant testified that if anything wrong existed at the time the car was interchanged, the appellee's records would have shown it; that the entries on the

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record in regard to the car were made at the time of the transaction by another, appellee's interchange clerk, who was not at the time of the trial in the service of appellee, but was absent from the state; and that witness knew nothing about the car save what he learned from the records, and the records had always been accepted by both carriers as correct. Appellee, over objection of apellant, also introduced as a witness in its behalf the yard master of the New Orleans & Northwestern Railroad Comany, who from the interchange records of his company, testified that the cattle were received on schedule time and in good condition from appellee at Meridian and promptly shipped to New Orleans. This witness did not keep the books and had no personal knowledge of the facts disclosed by their entries; nevertheless, the entries were read to the jury."

These records seem to be absolutely the same kind of records that were attempted to be entered in the present case over the objections of the plaintiff, by a witness who did not keep the books and had no personal knowledge of the facts disclosed by their entries.

On this statement of facts Judge WHITFIELD, delivered the opinion of the court in the following language. "The action of the court in admitting the interchange of records, the private records kept by a private corporation, was manifestly erroneous."

Judge FLETCHER in 95th Miss. at page 357, delivered the opinion of the court in the following language; "The judgment obtained by appellee depends in some degree upon the correctness of the book in which the weights of the number were recorded by appellee's weighmaster, one Stillwell. On the trial, although this book was introduced in evidence and used by the witnesses as a basis of computation, the weighmaster was not introduced to show that the book was correctly kept, nor was there any evidence produced which

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would tend to show that the entries were accurate. Indeed, it was stated by the appellee that the weigh-master was in California, and no effort was made to have his deposition taken. While this court has no disposition to be over-technical in regard to the admissibility of books as evidence, yet such evidence cannot be received without competent proof of their correctness. *Railroad Co.* v. *Provine,* 61 Miss. 288. It was error for the court to permit the introduction of this proof."

So we see from the Provine case in the 61st Miss. down through the case of *Hicks* v. *Lumber Co.,* in 95th Miss. Our court has uniformly held that records kept by private corporations are private memoranda and not entitiled to be introduced as evidence except under general rules for the introduction of private memoranda. Our court has never in any way changed the ruling as announced by this court in the above cited cases. If the court should hold that the trial court erred in following these decisions it would have to overrule the law as laid down in these decisions and I do not think there will be any disposition on the part of this court to change the rules of evidence that are universal, not only in Mississippi, but in all the other states.

If the appellant suffered on account of this ruling of the court they suffered on account of their own negligence in not having proper evidence before the court in order to make their private memoranda competent evidence.

They then complain that the court erred in granting a directed verdict for appellee with the record showing that the cotton had been delivered to the carrier at the shipping and never delivered from the carrier at the point of destination. Even had there been evidence to show that this cotton was delivered constructively to the compress by being placed on a side track near

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the compress, we state that in our judgment, we still would have been entitled to a peremptory instruction.

The private contract and bond entered into by and between the Grenada Compress Company could not possibly bind Threefoot Brothers as the record fails to disclose at any place that Threefoot Brothers had any knowledge, constructive or otherwise, of the existence of this contract between the railroad company and the compress company and the bond that was given by the compress company according to the proof was to cover cases where people lost their cotton by reason of this constructive delivery as agreed on and would have a ground for action against the railroad company as an insurer until the cotton had been actually delivered. What other reason could there be for giving a bond?

I also wish to call the court's attention to the clause in the special contract, Record page 39, section 10 of the contract, in which the compress company agrees: "to protect, defend and hold the railroad company harmless from any liability, damages, loses, or claims that may arise, except by fire, from the loss or injury or delay of cotton in transit, warehouse cotton, loaded cotton or billed cotton or any part thereof from the time of the delivery to the compress until redelivery to the railroad company of cotton in transit and warehoused cotton." Also section 11, where the language is; "For the purpose of this agreement when cars are placed upon sidetracks used for the compress cotton in or on such cars, shall be considered delivered to the compress, and when cars have been loaded by the compress." Clearly a private agreement contrary to the general law governing the delivery of freight not binding anyone except those that were parties to the contract or he had such knowledge of the contract were brought in connection with the contract we respectfully submit that this record

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fails to show as stated before, where Threefoot Brothers, or anyone else connected with the ownership of this cotton, had knowledge or had given their consent to any such argeement.

In addition to this, as stated before, the compress never agreed but expressly excepted cotton that could be burned, it being the law of the land that the railroad company when it accepted freight, under its contract agrees that its liability as an insurer shall continue from the time the goods are placed in the hands of the carrier until the cotton has been transported to the point of destination, notice given to the consignee and a reasonable time has elapsed for the delivery of this cotton. In 84th Miss. in the case of *Railroad Company* v. *Horton*, 490, Judge TRULY used this language:

"The liability of a railroad company as a common carrier does not terminate until the freight has reached the point of destination in good order, notice of its arrival has been given to the consigneee, and a reasonable time allowed for its removal. This is the law, irrespective of any custom on the part of the railroad companies. *Alabama & V. Railway Co.* v. *Pounder*, 82 Miss. 568, (S. C. 35 So. 155)."

We call the court's attention especially to the language of Judge TRULY where he says: "This is the law, irrespective of any custom on the part of railroad companies."

Two other cases in regard to this are exactly in line with this statement on the part of Judge TRULY, especially the case of *Gulf & Chicago Railroad Co.* v. *Ferguson-McKinney Dry Goods Co.*, 52 So. 797, Judge MAYES speaking for the court says: "The liability of the carrier as insurer of the goods continues after arrival of the goods at their destination until notice to the consignee and until the consignee has had a reasonable time in which to remove his

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goods. All these things may reasonably be said to be within the terms of the contract or carriage."

If the fact of the arrival of the cotton in Holly Springs as is claimed by the railroad company, though not shown in this record, shows that the cotton came the afternoon before the fire and was placed on the side track too late to be unloaded, could anyone say that notice had been given when no notice had been given, and that a reasonable time had elapsed for the unloading of the cotton, consequently unless the decision of the supreme court in regard to the liability of the carrier as insurer, continued as is stated by Judge TRULY and Judge MAYES, until delivery shall be set aside by this court, and overruled, there can possibly be no error in the record before the court. We respectfully submit that there being no error committed by the lower court on any of its rulings that this should be affirmed.

COOK, P. J., delivered the opinion of the court.

The appellee sued the appellant for the value of thirty-one bales of cotton alleged to have been destroyed by fire while they were in the possession of the appellant as a common carrier.

The facts brought out at the trial were that the cotton was delivered to the carrier at Taylor, Miss., to be transported to Holly Springs, and there delivered to the Grenada Compress Company. In other words, the bill of lading shows that the cotton was consigned to the Threefoot Bros. & Co. in the care of the compress company at Holly Springs.

The railroad company offered evidence to show that the cotton had been delivered to the compress company before it was burned. The contract between the compress company and the railroad company, in regard to the delivery of cotton, was that the railroad

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company would switch the loaded cars to the side track serving the compress company, and when so placed the compress company accepted the cotton as delivered to it under the contract of carriage. This was the contract, and this was the universal custom.

The numerous objections to all of the evidence offered by the appellant makes it difficult to work out all of the details of fact. We think the books excluded tended to show that the cotton was delivered to the compress company according to the contract and custom. We must accept this evidence as true, inasmuch as the trial judge excluded it all and directed a verdict for the plaintiff. The bill of lading, without a doubt, constituted the compress company the agent of Threefoot Bros. & Co. to receive the shipment. It does not appear whether the cotton was to be compressed or simply stored, but it does appear that the compress company was the agent of Threefoot Bros. & Co. to accept delivery.

The evidence tended to show a delivery of the cotton to the compress company before it was burned. This being true, it follows that the peremptory instruction to find for the plaintiff was error. We do not deem it necessary to discuss the detailed assignments of error.

On a retrial of the case, the question as to the admissibility of the books of the railroad company may or may not present difficulties. The bookkeeper may be present to testify; if so, the precise point argued on this appeal would not arise.

There was enough evidence to carry the case to the jury.

Reversed and remanded.

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EX PARTE GOLDSBY.

[83 South. 673, In Banc. No. 21231.]

BAIL. *Amount reduced where defendant poor and in ill health.*

Where a defendant charged with crime was required to give an excessive bond, the supreme court on appeal in a *habeas-corpus* proceeding will reduce the amount of the bond where it appears that on account of his poverty the defendant will otherwise be denied bail and where his physicial condition is such that his health may be endangered by confinement.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Habeas Corpus proceeding by R. J. Goldsby. From a judgment denying relief the petitioner appeals.

The facts are fully stated in the opinion of the court.

Anderson, Vollor & Kelly, for appellant.

The rule relative to granting bail is: "That bail must be fixed at such sum as will be likely to secure the attendance of the accused at the trial." *Ex Parte Bridewell,* 57 Miss. 39. "Where it was shown that the prisoner had very little property and was in bad health bail was fixed at two thousand dollars." The defendant in this case was charged with a capital offense. *Moore* v. *State,* 36 Miss. 137. In other cases where bail was fixed by the supreme court all being cases of murder, the bail required was not in excess of ten thousand dollars. *Ex Parte Jack,* 22 So. 188; *Ex Parte Patterson,* 22 So. 186; *Ex Parte Catron,* 21 So. 1029; *Ex Parte Mayors,* 34 So. 151.

The record shows that the appellant in this case is worth in cash and property about ten thousand dollars; that he is in bad health suffering from heart disease and Bright's disease and that his condition requires a nurse, comfortable bed, liquid diet and rest and quiet. The common knowledge that all men have

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must lead to the opinion that such treatment cannot be obtained in jails, Dr. Pettit positively testified at the hearing of the *habeas corpus* proceeding that the appellant has heart and Bright's disease. His testimony also clearly announces that confinement in the jail is likely to produce serious results to the appellant. Dr. Myers, who testified on behalf of the state, agrees with Dr. Petitt that there is trouble with appellant's heart, which he termed as a "heart murmur." He also found albumen in his urine, but that by reason of his failure to make a microscopic examination of his urine he was unwilling to say whether the albumen was caused from Bright's disease or other trouble. Therefore, with the positive testimony of Dr. Pettit that the appellant is afflicted with heart trouble and Bright's disease, the superficial test of Dr. Myers cannot be taken to prove that he is not so afflicted. But Dr. Myers does say that if the relator became chilled, suffering from the disease which Dr. Pettit says he is troubled with, that it would make the appellant worse and might bring on an accute attack.

If there was ever a case where reasonable bail should be granted it is the case at bar.

No brief of record for appellee.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a judgment in a *habeas corpus* proceeding. The appellant was held in custody on eight indictments charging him with receiving stolen property. Six of the indictments charge felonies and two misdemeanors. He was arraigned on each of the indictments, and pleaded not guilty, and an order was entered fixing in each case the amount of his bail; that in each felony being two thousand, five hundred dollars, and in each of the two misde-

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meanors being five hundred dollars making a total of sixteen thousand dollars.

The value of the property alleged to have been received by him is alleged in the six felony indictments to be one hundred dollars, two hundred and sixteen dollars, fifty dollars, thirty dollars, seventy-two dollars, and fifty dollars, respectively. Being unable to make these bonds, this proceeding was instituted to obtain a reduction thereof, but which the court below after hearing the evidence declined to do. It appears from the evidence that the claims of the appellant that he is unable to make these bonds because of the amounts thereof is true, and, in addition, it also appears that his physical condition is such that his health may be endangered by confinement.

In order that the appellant may not be denied bail, each of these bonds should be reduced to an amount which, in the aggregate, he will be able to give, and which at the same time will be calculated to insure his presence at the trial. Viewing the evidence in this light, we are of the opinion that a bond of seven hundred dollars in each of the felony cases, and a bond of one hundred dollars in each of the misdemeanor cases, will be sufficient, and an order to that effect will be here entered.

The judgment of the court below will therefore be reversed, and judgment will be entered here as above outlined.

Reversed.

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MARTIN v. PARTEE.

[83 South. 673, In Banc. No. 21001.]

COVENANTS. *Evidence. Warranty against incumberances includes taxes. Parol evidence inadmissible to show grantee assumed payment of taxes.*

Under Code 1906, section 2817 (Hemingway's Code, section 2318) so providing the word "warranty" in a conveyance embraces all five covenants known to the common law and a warranty against incumberances, except a described mortgage includes a warranty against a lien for taxes for the current year. And parol evidence is inadmissible to show that the grantee agreed to pay the taxes as a part of the consideration since to allow this would be to import a new element into the contract and would contradict the express language of the deed itself by excluding the taxes for that year from the convenant against incumbrances therein contained.

APPEAL from the chancery court of Quitman county. HON. JOE MAY, Chancellor.

Suit by Chas. W. Partee, Jr., against S. R. Martin. From a decree for complainant, defendant appeals. The facts are fully stated in the opinion of the court.

Church & Gannaway, for appellant.

The line of authorities relied upon by the plaintiff below, setting up the rule that parol evidence is not admissible to contradict a written instrument, is not applicable to this case. This rule is never applicable in matters of consideration. The testimony offered by Mr. Martin was not an attempt to vary or contradict the deed, but to show that the 1917 taxes had, in fact, been paid by Mr. Martin in the settlement. *Wade* v. *Barlow,* 89 Miss. 33; *Meyers* v. *Casey,* 57 Miss. 615; *Allen* v. *Miller,* 99 Miss. 75.

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2. The tax sued for was actually paid by Martin to Partee in the settlement, and the cash consideration paid by Parte was less than it would have been under the contract but for this payment of taxes. While the suit might have been maintained by one of the subsequent vendees of Partee, it was actually filed by Partee, who had received the money, and cannot, for that reason, be maintained.

It is permissible to show by parol that an encumbrance, not excepted in the deed, was actually paid for or settled by the grantor, and that a tax not specifically excepted in the deed was in fact paid by the grantor in the settlement. *Laudman* v. *Ingra,* 49 Mo. 212; *Fitzer* v. *Fitzer,* 29 Ind. 468; *Carter* v. *Louthian,* 38 Ind. 530; *Hays* v. *Peck,* 8 N. E. 274; *Pitman* v. *Conner,* 27 Ind. 337; *Robinius* v. *Lister,* 95 Am. Dec. 674; *Haire* v. *Baker,* 5 N. Y. 357; *Coop-Wood* v. *McCandliss,* 99 Miss. 364; *Fowlkes* v. *Lea,* 36 So. 1036; *Allen* v. *Lee,* 48 Am. Dec. 352; *Hall* v. *Dean,* 13 Johns 105; *Sidden* v. *Riley,* 22 Ill. 111; *Leland* v. *Stone,* 10 Mass. 459; *Spurr* v. *Andrew,* 6 Allen 422.

3. Partee was not an innocent purchaser since he expressly assumed the payment of these taxes, and to allow him to collect for them a second time would be to allow him to perpetrate a fraud. The Mississippi authorities above cited, together with all of the authorities relied upon by Partee, setting up the rule of the inadmissibility of parol evidence to contradict a written instrument, hold that such evidence is admissible to prevent fraud.

4. He who comes into equity must come with clean hands and Partee cannot sue for the recovery of these taxes, when the record shows that he expressly agreed to pay them as a part of the consideration for the land.

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5. The settlement sheet was in writing and was clearly admissible in evidence.

6. If the court should hold that the appellee is right in his contention that the testimony is inadmissible in evidence showing that the payment of the taxes by Partee was a part of the consideration of the purchase of the land, then, in order for justice to be done, this court should enter a decree, without prejudice to Martin to sue Partee to recover the amount of the taxes or to file a bill to reform the deed.

E. C. Black and *J. W. Mack,* for appellee.

Now as to the legal propositions involved in this case, we respectfully submit to the court the following authorities for its consideration: We think that the preponderance of the testimony abundantly establishes the fact that Mr. Partee did not assume the 1917 taxes, but if we should be mistaken in this, then we submit that any agreement that he may have made to this effect was oral and before the execution and delivery of the deed, as testified to by Mr. Martin, himself on pages 57, 58, and 59 of the transcript, and would be incompetent as tending to contradict the deed. 10 R. C. L., pages 1021 to 1023 Inc., *Cox* v. *Reed,* 74 So. 330; *Baum* v. *Lynn,* 18 So. 428, 72 Miss. 942; *Cox* v. *Blackburn,* 58 Miss. 537; *Johnson* v. *Johnson,* 21 So. 147, 74 Miss. 549; *Thompson* v. *Bryant,* 21 So. 655, 75 Miss. 12; *Wren* v. *Hoffman,* 41 Miss. 616; *Maxwell* v. *Chamblin,* 23 So. 266 (not officially reported); *English* v. *Railroad Co.,* 56 So. 665; *Houck* v. *Wright,* 23, So. 422, 77 Miss. 476. And many other Mississippi cases that could be cited.

See also Devlin on Deeds, sections 914 and 915. The authorities hereinbefore enumerated lay down the doctrine that in the absence of any fraud or mistake, oral testimony will not be admitted to vary or contradict

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a written instrument. This is so well settled that counsel would not and could not deny it.

In this case we might add that there is absolutely no hint of any fraud, accident or mistake, nor any attempt to reform the instrument because not stating the contract, so we have before us the plain proposition of whether or not appellant would be permitted to show by oral testimony that Mr. Partee, when he accepted the deed, not only assumed and agreed to pay the debts set out in the deed, but also obligated himself to pay another lien on the land not mentioned therein, and if this is permissible, then why not show that appellee promised to pay some other indebtedness that might be mentioned.

If this was the rule, it is manifest that a covenant of warranty in a deed would mean nothing and there would be no limit to the side agreements and understandings that might be proved in a case like his. In fact to state the proposition is to show its absurdity.

Counsel for appellant has cited many cases, none of which are in point, with the exception of possibility one. The case of *Allen* v. *Lee,* 48 Am. Dec. 352, which is a South Carolina case cited by counsel, at first glance appears to sustain counsel's position, but a closer reading of it shows that the facts were entirely different from the facts in the case now before the court.

The warranty in the South Carolina case was not to take the party bringing the suit, but to another person.

This seems to be the only case that counsel could muster that even pretends to remotely sustain his position, and it is thoroughly discredited by every decision that has come from our court where this question was involved. Without taking up the time of the court unnecessarily we will refer only briefly to some Mississippi cases directly in point.

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In the case of *Baum* v. *Lynn,* 18 So. 428, it is held that a deed which recited that whereas the grantee's guardian had loaned his ward's money to the grantor, the grantor in consideration of her release from liability of such loan, did thereby convey, etc., parol evidence is inadmissible to prove that in addition to the release of grantor such deed was made and accepted in release of the guardian's liability also.

In the case of *Johnson* v. *Johnson,* 21 So. 147, the court holds that a receipt by the vendor of lands acknowledging the payment of money by the vendee "to be placed to his land credit and balance to account" is a contract for the application of the payment which cannot be varied by parol.

And the stronger case is that of *Thompson* v. *Bryant,* reported in 21 So. 655, 75 Miss. 12, holds that where a vendor by bill of sale reciting the transfer of one-half interest in a partnership for a stated price and a note given by the purchaser for the balance of the price after paying a part in cash cannot be varied by parol evidence to show that the purchaser, as a part of the consideration assumed the seller's share of the firm's debts.

The case of *English* v. *The Railroad Company,* reported in 56 So. 665, holds that where the plaintiff by writing acknowledged receipt from the defendant, of seven thousand dollars in full satisfaction of all claims on account of personal injury, could not be varied by parol evidence showing that as a part of the consideration of the release, defendants agreed to obtain employment for him as soon as he was able to work.

Now it is the contention of the appellant in this case that the parol testimony offered and rejected by the court was only for the purpose of showing the consideration and not to contradict the terms of the deed and therefore not incompetent. The same contention was made in the case just above cited in *English* v. *Railroad Company* but the court in its opinion says that

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the receipt or statement acknowledged receipt of the money in much more than a receipt, and could not be varied by parol, citing a number of cases already mentioned above.

We now desire to call the court's attention to the case of *Maxwell* v. *Chamblin,* not officially reported but to be found in 23 So. 266, which in our opinion settles this case beyond controversy.

This case holds that where an agreement for a conveyance, and the deed conveying the property merely shows a sale subject to an existing lien, parol evidence is inadmissible in the absence of fraud or mistake, showing that the grantee agreed to pay the debt represented by the lien. This case goes beyond any that we have yet cited and following the reasoning in this case, in the case at bar, if Mr. Martin had conveyed this land to Mr. Partee and reciting that the conveyance was subject to the lien in favor of the bank in Memphis, then Mr. Martin could not be heard to testify that Mr. Partee assumed said lien, which of course is a much stronger case than we now have before the court.

It has been argued by appellant that the oral testimony offered was not intended to contradict the deed, but only to explain the consideration, but we can see at a glance that instead of explaining the consideration, it imposes on the appellee a duty to shoulder a burden in addition to that imposed on him by the plain terms of the deed.

We submit that this cannot be done, and learned counsel in his brief has shown us no authority for his contention.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a decree awarding the appellee, who was complainant in the court below, damages because of the breach by the appellant of a covenant of

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warranty contained in a deed executed by the appellant to the appellee. The appellant lives in the State of Tennessee, and the suit was begun by an attachment under the provisions of section 537, Code of 1906 (Hemingway's Code, section 294).

The appellant sold certain land to the appellee by a warranty deed executed on the 4th day of September, 1917; the consideration therein set forth being five thousand dollar in cash, the assumption by the grantee of an indebtedness amounting to twelve thousand dollars due by the grantor to a third person and secured by a deed of trust on the land, and the execution by the grantee to the grantor of several promissory notes aggregating the sum of fifteen thousand dollars. The appellant failed to pay the taxes due on the land for the year 1917; consequently the appellee was compelled to do so himself, and, upon the appellant declining to reimburse him therefor, he instituted this suit.

The appellant's defense is, and he sought, but was not permitted, to introduce parol evidence to prove, that at the time of the execution of the deed the appellee agreed as a part of the consideration therefor to assume the payment of the taxes on the land for the year 1917. The warranty contained in the deed, being general, covers all incumbrances on the land, including the taxes for the current year. Section 2817, Code of 1906 (Hemingway's Code, section 2318); *Swinney* v. *Cockrell*, 86 Miss. 318, 38 So. 353. And to admit the evidence sought to be introduced by the appellant would not only import a new element into the contract, to wit, a promise by him to pay the taxes on the land for the year 1917, but would also contradict the express language of the deed itself, by excluding the taxes for that year from the covenant against incumbrances therein contained; consequently no error was committed by the court below in excluding it, for, while a consideration recited in a written instrument merely as a fact may be varied

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by parol evidence, the terms of the instrument itself cannot be. *Baum* v. *Lynn,* 72 Miss. 932, 18 So. 428, 30 L. R. A. 441; *Thompson* vs *Bryant,* 75 Miss. 12, 21 So. 655; *English* v. *Railroad,* 100 Miss. 575, 56 So. 665.

Where a deed contains a covenant against incumbrances, the authorities are conflicting as to whether or not the assumption by the grantee of the incumbrance may be shown by parol evidence. 3 Ency. Evidence, 386; 2 Devlin on Deeds (3 Ed.), section 914. But the rule in this state is that such evidence is inadmissible. *Maxwell* v. *Chamberlin,* 23 So. 266.

Affirmed.

HANDY v. MERCANTILE LUMBER CO.

[83 South. 674, In Banc. No. 20964.]

MASTER AND SERVANT. *Violation of statute limiting working hours gave no right of action to injured employee not working about machinery.*

Law 1916, chapter 239 (Hemingway's Code, sections 4523-4524) making it unlawful for parties engaged in manufacturing or repairing, to work an employee more than ten hours a day applies only to employees working with or around machinery and its violation gave no right of action for injury to an employee unloading from cars lumber which other employees were taking to the planing machine.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Action by Mitchell Handy against the Mercantile Lumber Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

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Ridgeway, Enoch & Ridgeway, for appellant.

Every violation of law enacted for the protection of another, that is the proximate cause of injury to that other, is negligence *per se,* and actionable. *Inland Steel Co.* v. *Yedinak,* 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 391; *Nickey* v. *Steuder,* 164 Ind. 186, 73 N. E. 117; *Payne* v. *Chicago, etc., R. Co.,* 129 Mo. 405, 31 S. W. 885; *Bludorn* v. *Missouri Pac. R. Co.,* 121 Mo. 258, 24 S. W. 743; *Mathison* v. *Mayer,* 90 Mo. 685, 2 S. W. 834; *Linciln Tr. Co.* v. *Heller,* 72 Neb. 127, 100 N. W. 197, 102 N. W. 262; *Omaha St. R. Co.* v. *Duval,* 40 Neb. 29, 58 N. W. 531; *Wise* v. *Morgan,* 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 458; *Siebert* v. *McManus,* 104 La. 404, 29 So. 108; *Kyne* v. *Wilmington, etc., R. Co.,* 8 Houst (Del.), 185, 14 Atl. 922; *Gibson* v. *Leonard,* 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376.

The supreme court of the State of California, in *McKune* v. *Santa Clara, etc.,* 110 Cal. 486, 42 Pac. 980, said: "That the failure of any person to perform a duty imposed upon him by statute or legal authority is sufficient evidence of negligence has been repeatedly declared by this court. *Siemers* v. *Eisen,* 54 Cal. 418; *Driscoll* v. *Market Street, etc., Ry. Co.,* 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203;" *St. Louis & Iron Mountain Railroad Co.* v. *McWhirter,* 229 U. S. 265, 57 Law Ed. 1179.

Point II.

THE APPELLEE ENGAGED IN MANUFACTURING.

The business in which the appellee was engaged is that of planing or dressing lumber. And the appellee is what is known as and called a custom planing mill. Throughout the section of the state in which appellee is domiciled are numerous planers. The purchasers of this lumber more often than otherwise require this lumber to be planed or dressed. And to meet this require-

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ment the manufacturers and sellers of this rough-sawn lumber, load and ship it out to their customers, via Jackson, Mississippi, in care of appellee, for planing. The appellee unloads the lumber, planes or dresses it, reloads it and ships it on to the customers. The operation is what is known as and called a milling-in-transit proposition.

The declaration alleges that the appellee carries on its business of planing lumber by means of a very great amount and variety of complicated machinery operated by the agency of steam, and large forces of employees.

This court, in the case of *Buckeye Cotton Oil Co.* v. *State,* 103 Miss. 767, 660 So. 775, said: "It will be observed that the business in which appellant was engaged is that of separating cotton seed into its component parts, giving to those parts new forms, and rendering them suitable for new uses. In the *Newman Lumber Co. case, supra,* we held that a person is engaged in manufacturing, within the meaning of this statute, when he is engaged in the production of articles for use from new forms, qualities, properties or combinations by means of an organized force of laborers working with machinery. From this it clearly appears that appellant is engaged in manufacturing."

So we say, that the appellee in the case at bar, whose business is that of planing or dressing lumber, which it does by a very great amount and variety of complicated machinery operated by the agency of steam, and large forces of employees, is engaged in manufacturing.

Point III.

APPELLANT WITHIN THE PROTECTION OF THE STATUTE.

It will be recalled that the declaration charges that the cars of lumber shipped to appellee for planing were placed on the private track of the appellee upon its premises and alongside its platform near its planing machinery for unloading for planing, and that the ap-

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pellant was employed to assist in unloading these cars, his particular duty being to climb up into the cars of lumber and stick or hand out the pieces of lumber therein to fellow employees on said platform, who loaded same on two-wheel carts and rolled it to the planing machinery nearby for immediate planing, and who immediately returned with other empty carts for more lumber from the car for planing. It will be also recalled that the declaration charges that by reason of the performance of said duty by the appellant, the said machinery, mill and business of the appellee was kept going and in operation, in that said lumber was at once planed or dressed on unloading and reloaded by others on cars for shipment, being what is called a milling-in-transit matter.

In the first opinion of this court in the case of *State* v. *Newman Lumber Co.*, 102 Miss. 802, 59 So. 923, this court, speaking through Mr. Justice REED said: "A reasonable definition may be given to 'manufacturing' (Century Dictionary) as the system of industry which produces manufactured articles, and to manufacture, as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery used more especially for production in a large way by machinery, or many hands working cooperatively."

And on suggestion of error in the above case, in 103 Miss. 263, 660 So. Co. 215, this court speaking through Mr. Justice COOK, restricted the above definition, and limited "manufacture" to production by machinery, saying: "The constant changes in and additions to the definitions of words is aptly illustrated by the word "manufacture." Dictionaries of latest publication have added new definitions, created by the growth of the language. Referring to Webster's New International Dictionary, 1910, "manufacture" is thus defined: "To

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produce by labor, especially now, according to an organized plan and with division of labor, and usually with the use of machinery," We must conclude that the legislature employed the words of this statute in their usual and most common sense, and when we now speak of manufacturing, we usually have in mind an organized force of laborers, working with machinery, to produce from the raw material the finished product. The broader language of our former opinion is qualified to harmonize with this definition."

And this court, in the case of *Buckeye Cotton Oil Co.* v. *State,* 103 Miss. 767, 60 So. 775, had occasion to pass further upon the definition, and through Chief Justice SMITH, said: "In order for appellant to be guilty, it must not only be engaged in manufacturing, but the employees alleged to have been worked by it overtime must be of the class protected by the statute."

In the Newman Lumber Company case we held that all possible employees of a manufacturing establishment are not within the protection of the statute; but it necessarily follows from the construction there put upon the statute that all employees who compose the organized force and work with machinery, whose work supplements that of the machinery, and must be performed while it is, and in order that it may be kept in operation, are within its protection. The legislature clearly intended to protect the employee who is confined to the precincts of the manufacturing establishment and who is practically held in bondage by the machine with, or in connection with, which his work is performed, making it compulsory upon him to answer all of its motions with corresponding action. Appellant's employees Ford, Brown and Green are therefore within the protection of the statute, and appellant violated it in working them for more than ten hours in one day.

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This, court, in this last case, speaking of the duty of said employee Brown, "That Sol Brown was a seed feeder, whose duty as such was to feed the cotton seed from the bins into the tunnel conveyor by which they are carried, by means of a screw, automatically into a sand and boll screen room."

And in regard to another employee, A. M. Henry, superintendent of the Buckeye Cotton Oil Co., who was named in the indictment, the court said in the above case; "It is also impossible for us to determine from the agreed statement of facts whether the employee Henry is of the class protected by the statute, as we are not thereby sufficiently advised of the character of the work performed by him. His having general supervision of the operations of said mill may, or may not confine him to the precincts of the mill, and charge him with the duty of supervising employees while at work and the machinery while in operation."

It is familiar learning that a law to pass muster, which prescribes a different rule of conduct for one employee, must be based upon some substantial difference in the business of the two employers that bears a reasonable and just relation to the rule prescribed; otherwise it would be unconstitutional. *Bradford Construction Co.* v. *Heflin,* 88 Miss. 314, 42 So. 174.

When the demurrer was argued in the court below, the learned attorney who represents the appellee, with the 113th volume of the Mississippi Supreme Reports in his hand, remarked to the court that he was going to read a decision that doubtless opposing counsel had read. He then read to the court that opinion in the case of *Bledsoe* v. *Bostic Lbr. & Mfg. Co.,* 113 Miss. 188, 73 So. 881, which holds that the employer is not liable for a violation of chapter 165, page 173, Laws 1912, unless the minor was employed indoors at work injurious to health, or in operating dangerous machinery.

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Chapter 165, Laws 1912, prohibits the employment of minors in doors at work injurious to health, or in operating dangerous machinery. It was not attempted to state a case under that act for the appellant was not working in doors at all, nor with machinery. And it was distinctly stated in the declaration that the suit was predicated upon a violation of the ten-hour law. But the Bledsoe case seemed to please opposing counsel, and had great weight with the learned trial judge, it appeared to us, as showing that the employee must work with machinery.

We respectfully submit that the appellant, who handed the lumber out of the car to fellow-employees who in turn carried it to the employees feeding the planers, who fed it to the planers, was as much within the protection of the statute as the employees who actually fed it into the planers.

So we say, that when the statute construed in the Bledsoe case, and this statute, construed in the Newman Lumber Company and Buckeye Oil Company cases, are compared, it at once appears that the Bledsoe case does not apply to the case at bar, and that the legislature did not intend to protect by the ten-hour law only those employees of manufacturers who operate the machinery, and only from injury by the machinery; but the intention was to protect all employees within the general designation as outlined in the Buckeye Cotton Oil Company case covers the beneficent purpose of the legislature in the passage of the ten-hour law, and keeps the application of the law within constitutional limitations.

And we respectfully submit that the appellant was an employee of the appellee company within the protection of the ten-hour law.

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Watkins & Watkins, for appellees.

The appellee is liable in this case, if at all, by reason of the violation of some statutory law of the state of Mississippi. Chapter 165 of the Acts of 1912 furnishes the rule for the liability of the appellee growing out of the employment of the appellant, if any liability there be.

The action of the appellant in this case is not based upon the common law; this is a statutory cause of action. There is no allegation in the declaration of any act or conduct amounting to negligence upon the part of the appellee, unless the employment of the appellant is itself negligence. The declaration contains no allegation that the place that appellee furnished appellant to work was unsafe; nor was there any other duty which appellee owed to appellant growing out of the relation of master and servant breached. The sole claim made by appellant is that he was required or permitted to work more than ten hours in one day, and having so worked, received injury for which the appellee is liable.

We beg to call the attention of the court to the fact that upon the 16th day of March, 1912 there were approved by the Governor of the state of Mississippi two acts regulating the relation of master and servant in respect to the hours of labor and the age of employees. These acts appear to have been passed on or about the same day, and, dealing with the same subject-matter, should be treated and construed together. Chapter 165, which comprises section 4508 to 4514 of Hemingway's Code, deals entirely with the employment of children of certain ages. Section 2 of the act prohibits the employment of a boy under sixteen years of ages in any manufacturing establishment for more than eight hours per day, or forty-eight hours per week. Chapter 157 of the Acts of 1912 prohibits any manufac-

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turing establishment from working its employees more than ten hours in any one day.

We respectfully submit that the relations of the appellees and appellant were controlled by chapter 165 of the Acts of 1912. That is necessarily true, because the appellant was under sixteen years of age.

It is perfectly apparent that one of the acts, that is to say, chapter 157, contemplates the employment of employees over eighteen years of age, and that chapter 165 had reference to the employment of minors, boys under sixteen and girls under eighteen; the one act referring to minors of a certain age, the other evidently dealing with the employment of adults. If that were not true, we would have one act, to-wit, chapter 157, which would permit the employment of minors for ten hours per day in manufacturing establishments, and another act prohibiting the working of minors of a certain age more than eight hours per day, or forty-eight hours per week.

In 36 Cyc, page 1151, the following rule is announced: "The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each.

We therefore respectfully submit that chapter 157 should be construed by the court as applying to adults, and chapter 165 as applying to minors under eighteen years of age. Both of the acts refer to employees in manufacturing establishments.

It will be conceded by appellant's counsel that the appellant does not fall within the protection sought to be afforded by chapter 165, section 9 of the chapter is as

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follows: The provisions of this act shall apply only to manufacturing establishments engaged in manufacturing or working in cotton, wool or other factories, and to canneries and manufacturing establishments where children are employed indoors at work injurious to health, or in operating dangerous machinery, but the provisions of this act shall not apply to fruit canneries."

The declaration contains no allegation that the plaintiff was employed in doors, at work injurious to health, or at work operating dangerous machinery. This act was construed in the case of *Bledsoe* v. *Bostick Lumber Co.*, 73 So. 881, 113 Miss. 118.

Now, it will be conceded in this case that the appellant was not working in doors, that he was not working around machinery, and was not in any manner charged with its operation. We respectfully submit that the demurrer was properly sustained.

It is the contention of the appellant, however, that his employment was in violation of chapter 157 of the Acts of 1912, to which we have directed the attention of the court. We wish to show the court that even if chapter 157, regulates the employment of minors, the appellee is not liable in this case, because the appellant does not fall within the protection afforded by the legislature of the state of Mississippi by that chapter. It will be noted that the liability sought to be predicated against the appellee in this case is purely statutory, that there is no independent ground of negligence attempted to be averred in the plaintiff's declaration.

The trouble about appellant's case is that this court has heretofore so construed chapter 157 as to apply only to employees engaged either in the actual operation of machinery, or employees who, in the performance of their duties, work around machinery, must conform their movements to it, and are kept in bondage by it; in other words, this court has placed practically the same

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construction on chapter 157 in respect to the employment of adults as has been placed on chapter 165 in respect to the employment of minors.

Chapter 157 of the Acts of 1912 was first construed by this court in the case of *State* v. *Newman Lumber Co.*, 60 So. 215, 103 Miss. 263. In that case a manufacturing concern was indicted for working one of its employees more than ten hours per day, and the question was very elaborately presented. The court was called upon to construe the act in its application to the class of employees to be protected, and in that case the court made it exceedingly plain that the act applied only to employees actually engaged in the operation of machinery.

This court was again called upon to construe the act in the case of the *Buckeye Cotton Oil Company* v. *State,* 660 So. 775, 103 Miss. 767. In that case, there was an affidavit against the Buckeye Cotton Oil Co., a manufacturing company, containing several counts charging the violation of chapter 157 of he Laws of 1912.

In that case, there were several employees who were engaged more than ten hours per day. Thy were all either engaged in the operation of machinery or had duties to perform in respect to its operation, which required them to conform the movements of their body to the manipulation of the machinery. The defendant, who was the appellant in that case, contended that although these employees were either engaged in operating or working around machinery, during the day, there were various periods of from ten to thirty minutes in which the employee was not engaged in the performance of any duty, and it was the contention of the appellant that this time should be deducted from ten hours per day allowed by law.

In that case, again, the constitutionality of the act was represented. It will be conceded that the appel-

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lant did not compose the organized force of the mill of appellee and work with machinery. Counsel for appellant, however, argue that his work supplemented that of machinery; in other words, his work did that without which the machinery could not be operated.

The legislature clearly intended "to protect the employee who is confined to the precinct of the manufacturing establishment and who is practically held in bondage by the machinery with, or in connection with which, his work is performed, making it compulsory upon him to answer all of its motion with corresponding action." (quotation from the *Buckeye Cotton Oil Company case, supra*.

The appellant does not allege that his duties were performed on the inside of the mill itself, even if material, and we call the attention of the court to the fact that all presumptions must be taken against the pleader. *Powell* v. *Stowers*, 47 Miss. 577; *McCerren* v. *R. R. Co.*, 72 Miss. 1013; *Clay* v. *Lowry*, 51 Miss. 879.

In the Buckeye Cotton Oil Company case, Judge SMITH says that the duties must be performed while the machinery is kept in operation; meaning, of course, that it must be some duty in connection with the operation of the machinery, which must be performed in order that the machinery be kept going, and has no reference to emplyees whose duties are remote from the operation of the machinery itself; the performance of which, however, is necessary in order that the mill may be operated.

Counsel for appellant, however, argue that the legislature must have intended to include within the act and the protection afforded thereby other employees than those engaged in the operation of machinery, or whose duties brought them in connection with the operation of machinery; and, to support this contention, counsel for appellant say that if the legislature had intended to

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include only employees operating or working around moving machinery, that it would have used different language. We think, if your Honors please, that the situation is just the reverse.

Point II.

Even if it be true that the protection afforded by chapter 157 of the Acts of 1912, apply to appellant, yet the appellee is not liable under the declaration in this case, because the violation of hours or service was not the proximate cause of the injury and the appellant was not in the performance of any duty connected with his employment at the time he was injured.

It is the contention of appellant's counsel that chapter 157 of the Acts of 1912 applies to minors as well as chapter 165. Conceding merely for the sake of argument the correctness of this position, a distinction must be borne in mind which is not observed in appellant's brief in respect to the difference between the violation of a law prohibiting the employment of a person and the violation of a statute fixing the hours of service.

The case of *Inland Steel Co.* v. *Yedinak* (Ind.), 139 A. S. R. 391, was of the class of cases dealing with a statute prohibiting the employment of minors at all. In such case, the master becomes an insurer for the safety of the minor.

The case of *McKune* v. *Santa Clara. etc.; Lumber Co.*, (Cal.), 42 Pac. 980, cited by counsel for appellant, was not a labor case at all.

In the case of *Waskiewisex* v. *Milwaukee Light Co.* (Wis.), 133 N. W. 596, the court used the following language: "The plaintiff's claim here is not based upon any injury because of obstruction to public travel, or to his rights as traveler or otherwise, in the street. He was a member of the crew engaged in the work at the time of the injury, and even though the car was unlawfully on the street, and unlawfully operated, such

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fact in no way contributed to the injury of which the plaintiff complains and gave him no right of action, and constitutes no breach of duty to the plaintiff upon the facts established by the evidence."

Likewise, the case of *Williams* v. *So. Pac. R. R. Co.* (Cal.), 160 Pac. 660, prohibited the employment of a minor at night. In that class of cases, as before stated, where the injury occurs while the employee is in and about the master's business; that is to say, injured in the course of the employment, negligence *per se* is said to exist and absolute liability predicated. But if the appellant's theory in this case is correct, we are dealing with a case where there was no absolute prohibition against the employment, but an act prohibiting the working beyond certain hours; and, in such cases it is always held that the excessive hours of employment must be the proximate cause of the injury; and it is ordinarily held that some act of negligence of the master must also occasion the injury, in addition to the employment for excessive hours.

Counsel for appellant cite the case of *St. Louis, I. M. & S. R. R. Co.* v. *McWhirter,* 229, U. S. 265, 57 L. Ed. 1179, and a very unfortunate citation for appellant this case is. In that case the statute of the United States enacted for the safety of the public and employees, prohibited the working of any employee on any interstate railroad more than sixteen hours, and in this particular case the brakeman was worked in excess of that time, and while so working he went to get off of the end of the pilot of the engine to perform some duty in connection with his employment, that is to say, he was going to throw a switch. He fell into the middle of the track and was run over and killed. The supreme court of Kentucky held that the act imposed absolute liability, and likened the act to the safety appliance acts of congress. The supreme court of the United States reversed the case and said that the master was

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not an insurer of the safety of the servant working over hours in excess of the statute. The court would not concede that the master would be liable if free from negligence, even if the working overtime occasioned the injury, but did say that in the particular case, although the employee was injured and lost his life while performing his duties, and working overtime in violation of the statute there being no negligence on the part of the master, there was no liability.

The question was again brought before the supreme court of the United States in the case of *A. T. & S. R. R. Co.* v. *Swearingen,* 239 U. S. 339, 60 L. Ed. 317. In that a fireman of a locomotive engine was required to work more than sixteen hours, and while oiling the engine, standing on the running board, in the performance of his duties, fell and was injured. The court held in that case that there was no liability. *St. Louis, I. M. & S. R. Co.* v. *McWhirter,* 229 U. S. 265, 279, 280, 57, L. Ed. 1187, 33 Sup. Ct. Rep. 858. The question was reviewed in the case of *Osborne, Admr. R. R. Co.* (Ky.), 164 S. W. 818; *St. Louis, I. M. & S. R. Co.* v. *McWhirter,* 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179; *Bjornsen Northern Pac. R. R. Co.* (Wash.), 146 Pac. 575; *St. Louis, I. M. R. R. Co.* v. *McWhirter,* 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179.

From the foregoing authorities, it is demonstrated that it is not sufficient for the employee merely to show a violation of the hours of service. At least some negligence on the part of the master must be shown. The foregoing authorities announce the rule that only slight negligence would be necessary. In this case, we have not even a suggestion that the master was guilty of any kind of negligence whatsoever; we have the bare fact of the claim of over service and the injury itself.

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SYKES, J., delivered the opinion of the court.

The appellee, Mitchell Handy, as plaintiff, by next friend, filed suit in the circuit court of Hinds county against the defendant, Mercantile Lumber Company, for damages for personal injuries. The declaration, in short, alleges that the lumber company violated the ten-hour labor law in his case by permitting him to work all day and all night. This law is found in chapter 239 of the Laws of 1916, sections 4523 and 4524, Hemingway's Code, and in part provides that: "It shall be unlawful for any person, firm or corporation engaged in manufacturing or repairing, to work their employees more than ten hours per day, except in cases of emergency, or where the public necessity requires in such departments."

The declaration negatives the necessity or emergency requiring the plaintiff to work for over ten hours. The duties of the plaintiff and the manner in which he sustained his injuries are thus alleged in the declaration:

"That the particular duty of the plaintiff that night was to climb up into a car of lumber and hand out pieces of lumber therein to fellow employees on said platform, who loaded same on two-wheel carts and rolled it to the planing machinery near by for immediate planing, and who immediately returned with other empty cars for more lumber from the car for planing, the same as in the daytime. That plaintiff before said hour of 4 o'clock a. m. had grown very weary, fatigued, sleepy, and listless as the result of his many continuous hours of labor and lack of rest and sleep as aforesaid; and about said hour of 4 o'clock a. m., plaintiff and his fellow employees having just finished unloading a car of lumber, plaintiff, as was his duty as said employee of defendant, climbed up into another car of lumber which was next to be unloaded, prepara-

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tory to unloading the same by the time his said fellow employees returned from carrying the last of the lumber to the planers from the car just unloaded, and plaintiff, in his weary, fatigued, sleepy, anl listless condition, the result as aforesaid of his many hours of continuous labor and lack of rest and sleep, must have fallen asleep momentarily, for suddenly he noticed that everything was quiet about him, and his fellow employees absent. And by reason of his weary, fatigued, sleepy and listless condition, the result of his many hours of continuous labor and lack of rest and sleep as aforesaid, plaintiff thought his said fellow employees would not return; and, by reason of his said condition, plaintiff thought it his duty to ascertain what had become of his said fellow employees, which it would have been had the orders to them been changed and orders given them by defendant to unload some other car than the one in which plaintiff was; and, in order to ascertain what had become of his said fellow employees, plaintiff undertook to climb down out of said car, and by reason of his said weary, fatigued, sleepy, and listless condition, the result as aforesaid of his many hours of continuous labor and lack of rest, plaintiff lost his footing and hold and fell between the said cars and platform to the ground, whereby one of his legs was broken and plaintiff otherwise bruised in his body."

There was a demurrer interposed and by the lower court sustained to this declaration. It is unnecessary to set out the grounds of the demurrer. From this judgment of the circuit court this appeal is presented.

One of the contentions of the appellee is that, the plaintiff being a minor, his rights and liabilities in this case are governed alone by chapter 165 of the Acts of 1912, sections 4508-4514, Hemingway's Code, and that under this act there can be no liability. *Bledsoe* v. *Lumber Co.*, 113 Miss. 118, 73 So. 881.

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It is not, however, necessary for us to decide in this case whether or not chapter 239 of the Laws of 916, sections 4523 and 4524, Hemingway's Code, only applies to adults, for the reason that the plaintiff fails to state a case in his declaration under this law as construed by the decisions of this court.

The particular work performed by the plaintiff on the night of his injury was that of unloading cars by giving the lumber to other servants on a platform, and these other servants then loaded the lumber on two-wheeled carts and rolled the lumber then into the planing mill near by. From the declaration it will thus be seen that the plaintiff was not engaged in working with the machinery, that he was not working about the machinery, that his work had nothing to do with the starting or stopping of the machinery, that his movements did not have to conform to the movements of the machinery. He could have unloaded the car while the machinery was not running. On the other hand, the machinery could be running while plaintiff was idle. There is no such connection between the work of the plaintiff and the operation of the machinery that brings the plaintiff within the protection of this law. It was not necessary for the plaintiff to go where the machinery was running. So far as the declaration shows, he may have been many feet away from any part of the machinery. Such an employee does not come within the protection of this law.

In construing this law in the case of *State* v. *Newman Lumber Co.*, 103 Miss. 263, 60 So. 215, 45 L. R. A. (N. S.) 858, it is said:

"Thinkers, working to conserve the mental and physical health of toilers in the modern manufactories, have discovered, or think they have discovered, that the concentration of the human mind and muscle, for many consecutive hours, upon the watching and manipulation of rapidly moving machinery, tends to weary the body

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of the worker, and to weaken his reasoning faculties, and, ultimately, to permanently impair his physical and mental efficiency. When the legislature prohibited employers engaged in manufacturing from employing laborers for more than ten hours, we think, it was the intention to promote the general welfare and protect the workers in that class of manufacture using machinery of a character which requires in its operation constant tension of mind and body. In other words, it was believed that there are manufactories in this state whose operatives could not work longer than ten consecutive hours without impairing their health, and without endangering their lives and their bodies, and yet competition forced the laborer to take the risk or starve. Believing this, the legislature, in the exercise of the police power of the state, enacted the law under review."

Again this law was under review in the case of *Buckeye Cotton Oil Co.* v. *State,* 103 Miss. 767, 660 So. 775. In that opinion this language is used:

"In order for appellant to be guilty, it must not only be engaged in manufacturing, but the employees alleged to have been worked by it overtime must be of the class protected by the statute. In the Newman Lumber Company Case we held that all possible employees of a manufacturing establishment are not within the protection of the statute; but it necessarily follows from the construction there put upon the statute that all employees who compose the organized force and work with machinery, whose work supplements that of the machinery, and must be performed while it is, and in order that it may be kept in operation, are within its protection. The legislature clearly intended to protect the employee who is confined to the precincts of the manufacturing establishment, and who is practically held in bondage by the machine with, or in connection with, which his work is performed, making it com-

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pulsory upon him to answer all of its motion with corresponding action.'[1]

This is the settled construction of the statute by this court.

The judgment of the lower court is affirmed.

Affirmed.

HOWE v. STATE.

[83 South. 675, In Banc. No. 20704.]

CRIMINAL LAW. *On affirming a conviction for murder court will not fix date for execution, where writ of coram nobis is pending.*

On affirming a conviction for murder with the death penalty, the supreme court will not fix a date for the execution, where it has previously reversed a judgment sustaining a demurrer to a petition for a writ of error *coram nobis*, but will remand the case to the trial court in order that the circuit court may have the whole case before it and at the proper time fix the date of execution, or take such action in the case as shall conform to the views expressed by the court in the consideration of the petition to vacate the judgment and grant the defendant a new trial.

APPEAL from the circuit court of Rankin county.

HON. A. J. MCLAURIN, Judge.

George Howie was convicted of murder and appeals. The facts are fully stated in the opinion of the court.

L. M. Burch, for appellant.

R. M. Bourdeaux, assistant attorney-general, for the state.

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STEVENS, J., delivered the opinion of the court.

Appellant was indicted and convicted of the charge of murder and by the circuit court of Rankin county sentenced to be hanged. From the judgment of conviction he prosecuted this appeal. Subsequent to the date of his trial and conviction by the circuit court of Rankin county and after the regular term of the circuit court had elapsed, appellant presented to the said circuit court his petition for a writ in the nature of the writ *coram nobis,* his application was overruled, and from the judgment of the court overruling said application an appeal was prosecuted to this court. On a former day of this term, that branch of the case involving the petition for a writ of *coram nobis* and the demurrer thereto was considered by this court, and the judgment of the circuit court sustaining the demurrer to the petition was reversed in so far as it involves the merits of said application. We have before us now an appeal from the judgment of conviction, that judgment which appellant subsequently asked the circuit court of Rankin county to set aside.

This appeal on the merits involves principally the question whether the defendant on the proof is guilty of murder or manslaughter. There is no merit in any point argued, and no question is raised upon this appeal that merits discussion. The judgment of conviction must be affirmed. We state our views upon the present record on account of the situation brought about by the application for the writ *coram nobis.* Inasmuch as we have reversed the judgment of the learned circuit court sustaining the demurrer to the petition for said writ and the cause has been remanded for further proceedings appropriate to such application, we are of the opinion that, instead of now fixing a date for execution, we should affirm the cause on its merits and remand the case to the trial court in order that the

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circuit court may have the whole case before it and at the proper time fix the date of execution, or take such action in the case as shall conform to the views expressed by us in the consideration of the petition to vacate the judgment and grant the defendant a new trial. If, upon a reconsideration of the petition for the writ *coram nobis,* the learned circuit court should conclude that such application should be overruled, then the circuit court can and should fix the date of execution. If, on the other hand, the said application should be granted and the judgment of conviction set aside and vacated, the necessity for the execution of this judgment will, of course, no longer exist. Let the judgment be affirmed, and the cause remanded solely for the purpose of allowing the circuit court to resentence the accused.

Affirmed and remanded.

NORWICH UNION FIRE INS CO. v. STANDARD DRUG CO.

[83 South. 676, In Banc. No. 20973.]

1. JUDGES. *Relation to attorneys does not disqualify, when.*
Under Code, section 165 and Code 1906, section 995. (Hemingway's Code, section 715) as to a judge not presiding where he is related to either party, a "party to an action or suit" being one who is directly interested in the subject-matter in issue; where the attorney employed by defendant on a contingent basis was a first cousin of the chancellor this did not disqualify the chancellor from trying the case.

2. SAME.
It is relationship to the parties, or either of them to the suit that disqualifies a judge, and not his relationship to an attorney in the case.

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APPEAL from the chancery court of Lauderdale county.
HON. G. C. TANN, Chancellor.

This was a suit by the Standard Drug Company against the Norwich Union Fire Insurance Company. Defendant filed a suggestion of disqualification of the judge which complainant contested and the chancellor declined to recuse himself, but granted an interlocutory appeal to settle the principles of the case.

The facts are fully stated in the opinion of the court.

R. L. McLaurin, J. R. Byrd and *Baskin & Wilbourn*, for appellants.

The response to the suggestion of disqualification first filed, record page 21, as we understand it, raises two questions only: 1. Without denying the facts set up in the suggestion, the response denies the legal conclusion from those facts, i. e., denies that by reason of the allegations of the suggestion, the chancellor is disqualified.

2. The response says, conceding the disqualification, the appellee will waive it and the appellant will suffer no harm from it. Neither response is good, we submit, as is manifest on a mere statement thereof. The appellee evidently was not satisfied with the response on page 21 of the record, and filed another answer to the suggestion, record page 22, in which appellee presented only two alleged reasons, to-wit:

1. It reiterates its denial No. 1 in the first answer of the legal conclusion that the chancellor was disqualified.

2. It denied that Judge BYRD had any interest in the result of the litigation, and denied the contingent nature of his employment.

The court will see, therefore, that as we understand it, the pleadings presented only the single issue of fact as to the interest of Judge Byrd in the success of the

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suit. The testimony, however, was undisputed on that issue, and showed beyond question that he was financially interested.

We submit, therefore, that it is manifest from the record that the Chancellor erred in refusing to recuse himself.

The constitution, section 165, reads as follows: "No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same except by the consent of the judge and of the parties. Whenever any judge of the supreme court or the judge or chancellor of any district in this state, shall, for any reason be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others of law knowledge to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified. Where either party shall desire, the supreme court for the trial of any cause, shall be composed of three judges. No judgment or decree shall be affirmed by disagreement of two judges constituting a quorum."

The Code, section 995, is as follows: "Judge not to sit when interested or related.—The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties." Th case of *Y. & M. V. Railroad Company* v. *Kirk*, 102 Miss. 41, is directly in point.

The case of *Dodds* v. *Kelly*, 107 Miss. 471, is to the point that the court may not render a decree favorable to the side that raises the point, and cures the dis-

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qualification. That the objection was raised in time and not waived is manifest from the facts and from the following cases: In *Minocks* v. *McGhee,* 97 Miss. 321, the court clearly indicates the point is not waived if raised "during the pendency of the suit."

The case of *Y. & M. V. Railroad* v. *Kirk,* 58 So. 710, cited *supra,* shows that the objection may be made at any time before final judgment. This case is also reported in 42 L. R. A. (N. S.) 1172, and is followed and quoted from at length in the case of *Brown* v. *Brown,* L. R. A. 1918F, 1033. There is a note to the case of *Brown* v. *Brown,* in L. R. A. 1918F, page 1036, wherein it is shown that one court's opinion in the Kirk case was cited and approved in *State* v. *Mayo,* 43 Okla. 105, 141 Pac. 433. It was the right of appellant to employ Judge Byrd as and when it did. It was Judge Byrd's right to accept the employment.

Appellee has no vested right to have the case tried before any particular chancellor. It was both wise and the duty of appellant to call attention to the disqualification when he did. Otherwise, after a great deal of expense had been incurred, it would have been the right and privilege of appellee at any time before final decree to raise the point.

We respectfully submit that the facts and the law are all one way, and that it is clear and manifest from the record that the learned chancellor erred in refusing to recuse himself.

Amos & Dunn, for appellee.

Section 165 of the Constitution of 1890, provides that "No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same except by the consent of the judge and of the parties." Section 995 of the Code of 1906 is to the same effect.

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Counsel for the appellant cite the case of *Railroad Company* v. *Kirk,* 102 Miss. 41, as decisive of the question here presented and while we do not question the correctness of the decision in the Kirk case, on the facts presented by the record in that case, yet with the greatest deference to the learning and ability of opposing counsel we insist that the decision in the Kirk case is not decisive of the question presented by the record in this cause; and we pray the indulgence of the court while we attempt to demonstrate the soundness of our contention.

In the Kirk case, Messrs. Barbour & Henry were attorneys for the plaintiff in the court below. The suit was for the recovery of damages from the defendant for personal injuries negligently inflicted on the plaintiff. After the case was tried in the lower court the defendant filed its motion to set aside the verdict and grant a new trial, "because Hon. W. A. Henry, the presiding judge was incompetent to hear the case, for the reason that Messrs. Barbour & Henry, who were counsel for the plaintiff, are both related to said presiding judge, the former being a brother-in-law and the latter a son, and said Barbour & Henry had said case upon a contingent fee. That the assignment of said interest of said Barbour & Henry was not filed with the papers, and was not known to counsel for defendant until after said cause was tried." Upon the hearing of the motion, an agreement was introduced in evidence, and reads as follows: "It is agreed in this case that there was no assignment in writing to the attorneys, but that it was agreed with the plaintiff Kirk, that they were to be paid a certain percentage of the recovery as compensation for their services; that this fact was not known to the attorneys for the defendant until after the trial and that the circuit judge knew nothing of what the agreement between the plaintiff and his attorneys was until the matter was presented on this

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motion. It is also admitted that J. F. Barbour is the brother-in-law, and W. A. Henry, Jr., is the son, of the presiding judge."

After quoting that portion of section 165 of the Constitution of 1890 above quoted, Judge COOK says: "The only difficulty in construing this constitutional limitation upon the power of judges to preside in the trial of causes lies in the interpretation and definition of the word parties. The courts of sister states have been called upon to define this word, appearing in statutes designed to cover the same conditions provided for in our constitution.

Some of the courts have adopted the narrow and technical signification of the word, and confined its application to parties to the record *eo nomine,* while others have given a broader and more liberal meaning to the statute by holding that by "parties" was meant every person who had a pecuniary interest in the lawsuit, whether their names were mentioned in the pleadings or not.

After thus stating the precise question for consideration and decision as well as the different views taken by the courts of sister states on that precise question, Judge COOK proceeds to review a number of cases of sister states on the question under consideration and after so doing announces the decision of this court on the facts as presented in the Kirk case as follows:

"We are convinced that the broad and liberal rule of construction is the soundest and wisest rule, and adopting this rule as our guide, we conclude that the circuit judge was disqualified to preside at the trial of this case. If the numerical weight of authority rested with the narrow view, we would unhesitatingly follow the lead of those courts adopting the broad and liberal construction of statutes and constitutions similar in language to our own constitution. In the absence of precedent, we would feel constrained to create a precedent in harmony with our views. Every litigant is entitled to

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nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence *aliunde* the record. The real parties in interest furnish the reason for the judge to recuse himself when it becomes known that they are related to the judge, although they may not be parties *eo nomine.*"

An examination of the facts and decisions of the courts of the sister states which were reviewed by Judge COOK in the Kirk case discloses the following, to-wit: The case of *Moses* v. *Julian,* 45 N. H. 52, 84 Am. Dec. 114, was a case where a probate judge before his appointment had acted as counsel in drawing a will, which was presented for probate before him after he had been commissioned as probate judge; and the point was made that he was disqualified to preside or to make any order to the probate of the will. In passing on this case the supreme court of New Hampshire at page 122 of 84 Am. Dec., says:

"Among this class of disabilities is that chiefly in question in this case, the fact that the judge, as is alleged, has acted as counsel for the party in the same cause, which has always been held everywhere to justify the suspicion and belief that, however upright he may be, he cannot avoid favoring the cause of his late client. It is, consequently, everywhere a just cause for the judge to withdraw, or for the party to recuse him.

"Our own reports abound with entries that ——, J., having been of counsel, did not sit; and the dockets furnish evidence abundant that the law which called for such entries was recognized and acted upon long before we had reports; one who has acted as counsel in taking depositions cannot act as a magistrate in taking others.

"And our statute, which forbids any justice of the supreme judicial court to sit upon the trial of any

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cause in which he has been concerned as party, or attorney, and forbids him to act as attorney, or to be of counsel, or to give advice in any matter which in the ordinary course of proceedings may come before the court of which he is justice, for adjudication (Stat. 1855, ch. 1659, sec. 23) must be regarded as a legislative recognition of the common law, applicable to all judges and judicial officers.

"This objection is purely personal. It has no application to the case of near relatives of the judge having been counsel; *voet, ubi sup;* not to the judge having been counsel in any other case, but it will be held valid where the cause is substantially the same, though it may not be precisely identical.

"It seems to us very clear that *a fortiori,* the acting advocate and giving of counsel in a case, whence a cause in court may spring up, after the judge has received his appointment must be good cause of disqualification as a judge, independent of any statutory enactment. It is the fact that the judge has acted as attorney, counsel, law adviser, or advocate, in relation to the business in hand, that furnishes the just cause of exemption, without reference to the time when such aid or counsel was given."

The case of *Crook* v. *Newborg,* 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190, was a proceeding by way of mandamus against Crook, a probate judge, to compel him to certify his incompetency to hear and determine the settlement of the final account of one Gammon as administrator. The objection urged to the competency of the probate judge was that one S. L. Crook, a first cousin of the judge was one of the sureties on the bond of Gammon as administrator. The court in that case said: "It has been too often adjudicated by this court to be now a matter of doubt, much less of dispute, that sureties upon an administrator's bond are bound and concluded by the decree against their principal

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primarily and to the same extent as their principal is bound. So, then, the question fairly presented may be said to be this: Is a judge disqualified from determining a cause in which a decree or judgment must be rendered, in which a first cousin, though not a party to the proceeding *eo nomine,* has an interest in the result of the trial?"

In passing on this question the court said: "Is the interest of a surety upon an administrator's bond in a decree to be rendered on a final settlement of his principal so remote and indireet as that notwithstanding the relationship of the judge he may render such decree?

"The purpose of the settlement is to state the account between the administrator and those interested in the matter of distribution of the assets of the estate whether they be heirs or creditors. An accurate statement of the account is a matter in which the administrator and the adverse parties are vitally interested. This, of necessity, involves the allowance of proper credits to the administrator for all money legally disbursed by him. And a charge against him of only such items as he is legally chargeable with. In the matter of the statement of this account it is of some moment to the sureties upon the administrator's bond that their principal should be charged only with such items as he is liable for, and that he be credited with all moneys rightly paid out by him, since the decree to be entered in the cause, by which they are bound, is predicated upon the account, as stated by the judge. Indeed, we doubt not but that they can prosecute an appeal to this court for the purpose of reviewing the decree.

"The interest of the surety in the decree to be rendered is direct, and, of consequence, his relation to the probate judge within the prohibited degree renders the judge incompetent to hear and determine the cause. When this is the case, under section 3381 of the code, it is the duty of such judge to certify the

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fact of incompetency to the judge of the circuit or to the chancellor of the division; and such register, judge, or chancellor must, upon such certificate, appoint a disinterested person practicing in the country learned in the law to act as special judge.

The case of *Roberts* v. *Roberts,* 115 Ga. 259, 41 So. 616, 90 Am. St. Rep. 108, was a suit by a wife against her husband for alimony and counsel fees. One of the counsel for the wife was a brother of the presiding judge, and another of the counsel for the wife was related within the fourth degree of consanguinity to the wife of the presiding judge. The husband, as defendant suggested that the judge was disqualified because of the facts above recited and in passing on the question the supreme court of Georgia said:

"It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did not ask any allowance of counsel fees, of course the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The moment the applicant asks for counsel fees the counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the counsel are as much parties to the case as if they were parties to the record. In *Sprayberry* v. *Merk,* 30 Ga. 81, 76 Am. Dec. 637, it appeared that a suit for divorce was brought by Sprayberry, as counsel for Mrs. Merk, against her husband, and that a bill in equity in aid of the divorce proceedings was also filed by him. The parties settled the controversy before final judgment, and the case was dismissed. It was held that the attorney had a right to bring a suit in his own name against the husband upon a *quantum meruit* for fees due the counsel for service in the case where he had represented the wife. In *Weaver* v. *Weaver,* 33 Ga. 172, a suit for divorce was brought, and there had

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been an order granting the wife temporary alimony and counsel fees. The libel for divorce was dismissed, and it was held that the effect of this dismissal was to rescind the order for alimony, but that the order for counsel fees was not rescinded, but counsel had a right to enforce the order as granted and was not driven to his action at law to recover the fees. These cases seem to show conclusively that, under the law of this state, fees which have accrued as the result of employment by the wife to bring an action for divorce, or have been allowed pending a suit for divorce or application for permanent alimony, absolutely belong to the counsel who rendered the services to the wife, and such counsel may, if necessary, enforce payment of the same by the husband through appropriate proceedings in their own name. The rule seems to be different in equity cases where counsel fees are allowed to a party who has brought a fund into court for distribution: *Morgan* v. *Fidelity Deposit Co.*, 101 Ga. 389, 28 So. 857; *Mohr-Weil Lumber Co.* v. *Russell*, 109 Ga. 579 (1), 34 S. E. 1095; *Johnson* v. *State of Arkansas*, 112 S. W. 143, 18 L. R. A. (N. S,) 619, 87 Ark. 45.

The case of *Howell* v. *Budd*, 27 Pac. 747, 91 Cal. 342, was a case where an alleged daughter of a decedent was seeking to have revoked certain letters of administration granted to decedent's grand nephew, and the sons of the presiding judge, as attorneys had contracted to try the case for the grand nephew on condition that they should receive one-third of the estate if they should succeed in defeating the suit of the alleged daughter; and it was held that the judge was disqualified under a statute providing that "no judge shall sit or act in any case . . . when he is related to either party by affinity or consanguinity," because the attorneys were in effect equitable owners of a portion of the estate under their contract with the grand nephew.

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The case of *Patton* v. *Collins,* 90 Texas, 115, 37 So. 413, was a suit on a promissory note which contained a provision for the payment of "ten per cent attorney's fees if collected by law or if placed with attorneys for collection." J. J. Ofiel one of the attorneys for the plaintiff was a brother-in-law to the presiding judge. The declaration alleged. "That plaintiffs have been compelled to employ Boyd & Ofiel, attorneys at law, to bring suit for collection and have agreed to pay them the amount of money mentioned in said notes, as attorneys, for their services." It was held that the judge was not disqualified because it did not appear that any interest in the notes sued on or any part thereof had been assigned to the attorneys for plaintiff. To the same effect see *Winston* v. *Marterson,* 87 Texas 200, 27 S. W. 768.

However, in the case of *M. K. & T. R. R. Co.* v. *Mitcham,* 57 Texas Civ. App. 134, 121 S. W. 871, it was held that the relationship of the presiding judge to the plaintiff's attorney operated to disqualify the judge where it appeared that a percentage of the amount which might be realized by or out of the suit was conveyed to such attorney.

In the case of *Dunbar* v. *Wallace,* 84 Ark. 231, 105 S. W. 257, it was held that mandamus would not lie to compel a judge to permit the filing of a suggestion of his disqualification merely because the fee of one of the attorneys in the cause, who was related to the judge, was contingent. But the court intimated that its holding might have been different if it had been alleged that such attorney had a direct pecuniary interest in the subject-matter of the litigation.

In the case of *Brown* v. *Brown,* 103 Kan. 53, 172 Pac. 1095, L. R. A. 1918F, 1003, it was held that where the judge of the district court was the father of the attorney for the wife, in a divorce suit, whose fee is

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to be fixed by the court, that the judge was disqualified, because the son was a "party" in interest within the meaning of section 57 of the Kansas Code.

In the case of *White* v. *McClanahan,* 133 La. 47, L. R. A. (N. S.) 448, 63 So. 61, where a son of the judge was employed by the plaintiff to bring suit against the defendant for damages, under a contract by which he should be paid a fee wholly contingent upon the amount recovered by the suit, it was held under the Louisiana Statute the son was a "party" because he had a "direct" interest similar to that of his client, in the judgment to be rendered, and under section 124 of Act 1906, may record his contract and thereby make himself a party to the record and acquire rights equal to those of his client with respect to the disposition of the cause." Hence that the judge was disqualified.

In the case of *State ex rel. Mayo* v. *Pitchford,* 43 *Okla.* 105, 141 Pac. 433, it was held that a statute disqualifying a judge when he is related to any party applies where one of the plaintiff's attorneys was the son of the judge and was prosecuting the suit, under a contract for a contingent fee, because under the statute providing for contingent fees, an attorney so acting has, at least, an equitable interest in his client's cause of action.

In the case of *Cavanaugh* v. *District Court,* 163 Iowa, 76, 144 N. W. 25, it was said that a statute disqualifying a judge in any case where he is related to either party, prevents a probate judge from making an order directing the payment of a certain fee to counsel whose associate was the son of the judge, such counsel having agreed to divide fees with such associate. In such case the son of the judge had a direct interest in the judgment and the proceeds thereof.

In the case of *Shuford* v. *Shuford,* 141 Ga. 407, 81 S. E. 115, the court following the decision in *Roberts*

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v. *Roberts,* 115 Ga. 259, *supra,* held that the judge, who was related to one of the counsel employed upon a contingent fee in a claim case, was disqualified to preside in the trial of the cause. We have no access to this case and have not read it, our only knowledge of it being obtained from a digest syllabus which is not very satisfactory; but from the previous decision in the *Roberts case, supra,* and the decision in the subsequent case of *Young* v. *Marris, infra,* we feel sure that a careful reading of the facts will disclose that the attorney who was related to the judge, and who was employed on a contingent fee represented the plaintiff or a claimant of the property in dispute and that such attorney was to be paid a certain percentage of the amount which his client recovered in the suit. *Young* v. *Harris,* 146 Ga. 333, 91 S. E. 37.

In the case of *Vine* v. *Jones,* 13 S. E. 54, 82 N. W. 82, it was held that under the statute requiring a county judge when he is a party to, or personally interested in any proceeding in any probate matter therein, or related to any person so interested, to certify to the circuit court such fact that he must make such certificate when he is related within the degree provided by statute, to an attorney who is prosecuting a cause on a contingent fee.

We have not cited in this brief any case except those holding the broad, or liberal view announced by Judge COOK in the Kirk case. We have diligently examined every decided case bearing upon the proposition under consideration so far as we have been able to find, and we have not found any case where the judge was held incompetent, or disqualified, because he was related to an attorney representing a mere defendant. In every case that we have found where he has been held to be disqualified because he was related to an attorney in the suit, such an attorney represented the plaintiff, complainant, cross-complainant, or claimant,

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and every such attorney had a contract with his client by which he was to receive a certain percentage of the amount recovered by his client in the suit or else his fee was to be fixed by his kinsman, the judge.

In all such cases where the judge has been held to be disqualified, the courts have based their decision upon the proposition that such an attorney, by reason of the fact that he was employed on a contingent fee basis, was a real party in interest to the suit, and that he was a real party in interest because by the terms of his contract with his client he had an interest or share in the proceeds of whatever judgment might be rendered in favor of his client. Several times in the various courts, in their efforts to limit and define, exactly the extent of the interest of an attorney in his client's cause that would make him a real party to the suit have said that the attorney must have "a direct pecuniary interest in the result of the suit." We submit after a careful examination of all of the cases holding the liberal view announced in the Kirk case, that a more accurate definition of what the courts have really held is, that in order for any attorney to be a real party to the suit of his client, he must have a direct pecuniary interest, or share in the proceeds of any judgment that may be rendered in said suit in favor of his client. No matter how the courts have expressed the rule, that is, the substance and effect of their holding in every case, when the actual facts are examined in the light of the actual decision of the court.

ETHRIDGE, J., delivered the opinion of the court.

The Standard Drug Company filed a suit in the chancery court of Lauderdale county against certain insurance companies, among which was the appellant company, for violating the antitrust laws of the state

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and for injuries resulting to the complainant by reason of such violations of the statute. The appellant demurred to the bill filed against it, the demurrer was overruled, the cause was appealed to this court, and was affirmed and remanded, as shown in *Norwich Union Fire Insurance Co.* v. *Standard Drug Co.*, 117 Miss. 429, 78 So. 353. After the case was remanded appellant was granted leave to amend or plead further. Subsequent to the decision of this court above referred to, a relative of the chancery judge was employed as counsel by the insurance company upon a contingent fee basis, that is, the said attorney was to be paid fifty dollars in cash and four hundred and fifty dollars additional, provided the defendant won all the suits filed by the appellee. Thereafter the defendant in the chancery court filed a suggestion of disqualification of the chancery judge because of his relationship or kinship to the attorney employed upon the contingent fee basis, as above stated. The complainant contested the suggestion for disqualification, and the chancellor declined to recuse himself, but granted an interlocutory appeal to settle the principles of the case. The attorney so employed on the contingent fee basis was a first cousin of the chancellor and the sole point presented for decision is whether the chancellor was disqualified by reason of his kinship to the said attorney so employed on the contingent fee basis.

The statutes involved are section 995, Code of 1906 (section 715, Hemingway's Code), which reads as follows:

"Judge Not to Sit When Interested or Related.—The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the

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judge and of the parties" and section 165 of the state Constitution, which reads as follows:

"No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the supreme court or the judge or chancellor of any district in this state, shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the Governor may commission another, or others, of law knowledge to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified. Where either party shall desire, the supreme court, for the trial of any cause, shall be composed of three judges. No judgment or decree shall be affirmed by disagreement of two judges constituting a quorum."

This court in the case of *Y. & M. V. Railroad Co.* v. *Kirk,* 102 Miss. 41, 58 So. 710, 834, 42 L. R. A. (N. S.) 1172, Ann. Cas. 1914C, 970, in construing this provision disqualifying judges, held that the trial judge was disqualified to sit in a case where the fee of plaintiff's attorneys, who were brother-in-law and son, respectively, of the trial judge, was to be a percentage of the amount recovered in the action. The agreement in that case reads as follows:

"It is agreed in this case that there was no assignment in writing to the attorneys, but that it was agreed with the plaintiff, Kirk, that they were to be paid a certain percentage of the recovery as compensation for their services, that this fact was not known to the attorneys for the defendant until after the trial, and that the circuit judge knew nothing of what the agree-

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ment between the plaintiff and his atorneys was until the matter was presented on this motion."

It was also admitted that the attorneys were so related to the circuit judge. This court in that case, in construing the statute above set out, adopted that line of authorities which hold that, if the attorney who is interested in the subject-matter of the litigation, though not a formal party to the record, is related to the judge, his relationship to the trial judge disqualifies the trial judge in such case, the court citing with approval in that opinion. *Crook* v. *Newborg,* 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; *Hodde* v. *Susan,* 58 Tex. 394; *Moses* v. *Julian,* 45 N .H. 52, 84 Am. Dec. 114; *Roberts* v. *Roberts,* 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108; *Johnson* v. *State,* 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S,) 619, 15 Ann, Cas, 531,

We are asked in the present case to extend the rule so as to make the word "parties" in the above statute include an attorney for the defendant, related as above stated, whose fee is a contingent one, even .though he has no contingent interest in the subject-matter of the suit nor in the judgment to be entered. An extensive examination of the authorities fails to disclose any case where an attorney for the defendant on a mere contingent fee disqualifies a judge related to such attorney under a statute similar to the provision of our statute set out. It is relationship to the parties, or either of them, to the suit that disqualifies a judge, and not his relationship to an attorney in the cause. We have gone farther than the majority of the courts in making an attorney related to the judge and having an interest in a suit a disqualification to a judge as being a party within the meaning of the law. We adhere to the rule announced in the Kirk Case, but decline to extend it further. We believe that the further extension of the meaning of this term, even if

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we had the power to enlarge upon the statute, would result in greater mischief than good. It is, of course, important that the trial judge be fair and impartial and removed from any improper influences in passing upon the rights of litigants, but to hold with the contention of the appellants would disorganize the judicial system of this state and result in practically unlimited special judges. The word "party" referring to judicial practice, is defined in Words and Phrases, First Series, vol. 6, as follows:

"A party to an action or suit is one who is directly interested in the subject-matter in issue; who has a right to make a defense, control the proceedings, or appeal from the judgment [citing authorities]. . . .

"Though, technically speaking, persons to whose use a suit is pending are not plaintiffs, yet in common parlance they might with propriety be both said to be parties where such use appears in the suit. . . .

"A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest or the claim of interest is the test as to the right to be a party to legal proceedings almost without exception."

In the case of *Young* v. *Harris,* 146 Ga. 333, 91 S. E. 37, the Georgia court, one of the states which we followed in the Kirk Case, had a case analogous to the present before it for consideration, and it was held that an attorney, whose contract with his client provides that he is to be paid a certain sum in all events and a larger sum if the attorney's client is successful, has no such interest in the subject-matter of the litigation as to disqualify the judge, who is a brother of the attorney, from presiding in the case. The court said at page 334 of 146 Ga., 91 S. E. 38:

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"A judge is not disqualified to preside in a case because his brother is the attorney for one of the parties and the size of his fee is dependent on his success in the case. There is no statute or canon of law which disqualifies a judge on the ground of relationship to the attorney of one of the parties to a cause. Such disqualification must result only when he has a pecuniary interest in the subject-matter of the litigation."

And on page 335 of 146 Ga., 91 S. E. 38 of the same case it is said:

"In the instant case the attorney has no interest in the *res;* he can recover nothing from the adversary party by virtue of his contract with his client, which is altogether outside of the subject-matter of the litigation. Such a contract gives the attorney no more interest in the litigation than if his contract were that his fee should be one sum should the trial occur at the first term and a different sum should the trial take place at a later term. Were the rule otherwise, it would be impossible for a judge to ever preside in a case where one of the attorneys is a kinsman within the fourth degree of consanguinity or affinity."

If the court should hold that a mere contingent fee, not rooted in the *res,* paid or agreed to be paid to a relative of the judge, would disqualify the judge, it would be within the power of the litigant to bring about the disqualification of the judge, even in this court, and even in criminal cases, and a litigant would never have to go to trial so long as he had means to employ attorneys related to the judge on a contingent fee. If this rule were established a man indicted for murder, or other felony, who did not want to stand trial, could wait until the case was called for trial, then employ on a contingent basis some attorney related to the trial judge by blood of marriage, suggest the disqualification of the trial judge, brought about by himself, and refuse to agree to a judge to try the case, and delay

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the case until a special judge was appointed by the Governor and qualified, and then might employ an attorney related to the special judge on similar conditions, and thus disorganize the judicial administration of justice to such degree and to such extent as to produce infinitely more mischief than mere relationship to the trial judge could possibly produce.

We have examined all of the authorities referred to by counsel, and we find no case which warrants us in extending the disqualifications of the judges related to the attorney for the parties on a mere contingent fee. So far as ascertainable from the reports all cases holding judges disqualified for relationship to attorneys employed on a contingent fee are cases where the attorney's fee was a part of the judgment recovered, or where his fee had to be fixed by the official action of the judge rather than by the parties employing such attorney. The chancellor having reached the same conclusion that we have reached, the judgment will be affirmed, and the cause remanded to be proceeded with.

Affirmed and remanded.

POSTAL TELEGRAPH-CABLE CO. *v.* EUBANKS.

[83 South. 678, In Banc. No. 20765.]

1. COMMERCE. *Interstate telegrams governed as to punitive damages by federal law.*

A telegram offered for transmission from a point in this state to a point in another state was an interstate message and governed as to the recovery of punitive damages by federal law.

2. TELEGRAPHS AND TELEPHONES. *Punitive damages not recoverable for agent's wilful refusal to accept message unless wrong was authorized or ratified.*

Under the federal rule no recovery of punitive damages can be had on account of the wilful conduct of the servant, unless the commission of the wrong was authorized by the master, participated in by him, or ratified by him.

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3. COMMERCE. *Act of telegraph company's agent in refusing to take interstate message. An interstate transaction governed by federal law.*

Where plaintiff went to defendant telegraph company's agent and stated that he wanted the agent to deliver a message to a point in another state, which the agent refused to do, the act of the agent was not wholly disconnected with interstate commerce, but was so intimately related to the proposed message, interstate in character, that his refusal to receive it was the act of an interstate agent in violation of a federal duty with reference to an interstate matter, and therefore controlled by the federal law as to the telegraph company's liability for punitive damages.

APPEAL from the circuit court of Quitman county.
HON. W. A. ALCORN, JR., Judge.

Suit by Sam Eubanks against the Postal Telegraph Cable Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. N. Flowers, E. B. Cooper and *H. C. Holden,* for appellant.

The question presented by the court is within a narrow compass. If it was the duty of appellant under the Federal Law, the measure of damages and their character are to be determined by that law.

Prior to June 18, 1910, telegraph companies were not as to interstate commerce common carriers. But on June 18, 1910, Congress enacted that they should be common carriers within the act to regulate commerce. They are, therefore, both common carriers under the laws of Mississippi and the United States, and as such they are under the duties of such carrier. And one of the primary duties of a carrier by telegraph is to accept a lawful message for transmission.

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The suit in the present case is a suit brought because of a failure to perform that duty. The message offered for transmission was a message to be moved in interstate commerce. Its origin was Mississippi and its destination Tennessee. There can be, and there is, no dispute as to this. The question is to what law shall we attribute this duty, the national or the state?

Suppose appellee tendered appellant a message to be moved in interstate commerce written upon paper other than the form which is supplied for that purpose and required that it be sent as an unrepeated message. We shall suppose the proper tender of the message fee. Would the appellee in that instance be in a position to bring this suit? Clearly not because we have a right to require him to enter into a certain contract in a message of that character limiting our responsibility. That right is derived from a Federal Statute, but the answer, it will be said, to this is that it is merely a right to refuse. Merely a defense to be offered. But if the duty to receive a message for transmission is derived solely from the state, this is an infringement upon the right of the state to enforce the duty of the telegraph company.

The situation detailed above is not a parallel to this case, but by showing its similarity to a case decided by the supreme court of the United States we hope to show that it contains in its last analysis the principle decisive of the case at bar. The court is familiar with the case as it is cited in our original brief. It is the case of *Southern Railway Company* v. *Reid,* 56 L. Ed., 257, 222 U. S. 424.

That was a suit brought to recover penalties for a refusal to receive an interstate shipment of freight. The statute of North Carolina provided a penalty for such refusal. There was a judgment for the shipper and against the railroad company. The railroad defended on the ground that it had no through rate and

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by the Interstate Commerce Act it could not accept until its rate was filed.

The supreme court of North Carolina in upholding the judgment of the lower court against the railroad company said: "The statutory enforcement under penalty of a common-law duty to accept freight whenever tendered is not within the scope of any act of Congress.'

To hold that the duty breached in the case at bar is one rising from our constitution, statutes, or the common law as our courts see it, would lead to the same conclusion as before set out. But the supreme court of the United States holds that because Congress has said the freight may not be received until the rate has been filed and approved, that this duty to receive cannot be enforced by the state.

Why could not the supreme court of the United States have said that the duty to receive was still uncontrolled by Congress, rested in common law but that the provision afforded only a defense in that particular case; and that in all other cases the state court might enforce this duty? That would be the logic of the situation if the answer supposed in the case of a telegraph company above is accepted as the solution of the question.

The principle to be deduced from the Reid Case is that where under the federal statutes any right is given which would warrant the refusal of the enforcement of the common-law obligations of a carrier that phase of a carrier's business has been removed from state control and the operation of state laws.

If Congress has given us in legislation a right to refuse to receive a message, has not Congress legislated upon our duty to receive? To state the question is to answer it. And this court needs no authority to convince it that when Congress takes possession of a subject within a proper sphere the rights and liabilities

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are to be determined by Federal Law. This court so announced the rule in the case of *Western Union* v. *Norman,* not yet reported. But it may be said that the Reid case was a statute and this case is not, but this court is penalizing us for not receiving a message by its own rule for punitive damages. There can be no difference in result because of a difference in the repository of the law, but there is still another guide post. The duty to receive certainly arises when Congress declared us a common carrier. The duty already existed under our law. Why should this court say our duty to receive was under the state law? Why shouldn't it say with as much force that it arose under the Federal Law? When the Federal Employer's Liability Act was passed the supreme court of the United States held that a laborer on a track devoted to both inter- and intrastate commerce was engaged in interstate commerce. Why not the same rule here?

And then again the duty to receive is no greater than the duty to transmit, or transport, or to deliver. There is nothing specific in the Interstate Commerce Act as to delivery, but it has been held that for delay in delivery the rights are to be controlled by federal law. *Southern Express Company* v. *Byers,* 240 U. S. 612, 60 L. Ed. 825. The refusal to receive falls within the same category.

So we submit that the rule of the federal courts as to punitive damages should have been applied. It was not done and the cause should be reversed. Since the writing of the foregoing we have received a copy of the opinion of the supreme court of the United States in the case of *Western Union Telegraph Company* v. *Peter Boegli.* We attach the only copy available to this brief for perusal by the court.

This case comes from the supreme court of Indiana and is found in 115 N. E. 773. The suit was brought to recover a penalty fixed by a statute for failure to

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deliver messages in the order in which they were received. The supreme court of Indiana, held that there was nothing in the Act of June 18, 1910, covering the specific duty of delivery and consequently the statute of that state as applied to the delivery of the telegrams was still operative.

We call to the court's attention also the case of *Southern Railway Company* v. *Prescott,* 240 U. S. 632. This was a case where freight was held as a warehouseman. The supreme court of South Carolina applied its own law in determining the liability of the warehouseman. The supreme court of the United States held this to be error as it was governed by national law. The interstate shipment had ceased and the freight was in the hands of the company as a warehouseman.

W. M. Donaldson, for appellee.

The argument of counsel in the brief of appellant is all directed to the issue as to whether or not the refusal of the agent to receive and transmit the message was willful. They admit that if such refusal was wilful, appellee had the right to recover. The jury found as a fact that the act was willful.

The court will not disturb a finding of facts by the jury unless it is manifestly wrong to such an extent as to have the appearance of prejudice. The testimony upon which the jury acted in this instance in finding this fact was directly at variance. The jury had a right to believe Graves alone, or all the other witnesses as opposed to him. They manifestly believed Eubanks and his witnesses as against Graves, the agent of appellant, and found as a fact that his refusal was willful. This they had a right to do.

If the jury found the refusal to receive and transmit the msesage to be wilful, then they had a right to find

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damages in favor of appellee, as was charged in the instructions, and as seems to be admitted by appellant's brief. It has been so decided by this court. *Johnson* v. *Western Union Telegraph Co.*, 115 Miss. 884, 76 So. 738.

The instant case comes squarely within the lines laid down in the Johnson case. It is argued that Graves did not refuse to send the message but only postponed it. That is Graves' version. Appellee's version, supported by the testimony of Jabo Johnson, Rufus Gordon and Mrs. Ezell, the telephone operator, is not only a refusal, but a willful refusal. The jury believed old man Eubanks, as corroborated by the other testimony, and found the fact. The court instructed them that if they found this to be a fact they could find punitive damage. They also did this. They found the fact which this court will not disturb, and applied the law as given them by the court, and which law this court has approved in the Johnson case cited above.

That seems to us to be all there is to argue.

HOLDEN, J., delivered the opinion of the court.

The appellant telegraph company has an office in Marks, Miss., where its agent was also the agent for the railroad company. The appellee, Sam Eubanks, desired to send a message to a relative in Memphis, Tenn., with reference to the death of his sister. He went to the office at the railroad station, and, finding no one there, went out upon the cotton platform near by, where he found the agent busy loading cotton, and said to the agent, "I want you to deliver a message to Memphis for me on the case of my dead sister." The agent, who was a Mr. Graves, said in reply to appellee, "I be damned if I stop loading cotton and send any message," whereupon appellee left the station for the pur-

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pose of sending the message by telephone. Suit was filed against the telegraph company, which resulted in a recovery of one hundred and twenty-five dollars as punitive damages for the willful and wanton failure of the telegraph company to receive and send the message offered by the appellee. No actual damages were shown.

This appeal by the telegraph company presents several questions for our decision, one of which is whether or not the conduct of the agent in failing and refusing to accept the message was such as to warrant recover of punitive damages. It is unnecessary, however, to decide this point, because a decision of another important question will end the case, and that is whether or not the conduct of the agent was in interstate commerce, and governed by the federal law with reference to the recovery of punitive damages.

It will be observed that the message offered for transmission was from a point within this state to a point within the state of Tennessee; therefore it was an interstate message. It being an interstate message, the federal law as to the recovery of punitive damages must ncessarily govern. *Postal Telegraph Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. ——, 40 Sup. Ct. 69, L. Ed. —— (Dec. 8, 1919).

Under the federal rule no recovery of punitive damages can be had on account of the wilful conduct of the servant, unless the commission of the wrong was authorized by the master, participated in by him or ratified by him. There is no proof in this record that the commission of the wrong in this case was either authorized, participated in, or ratified by the master; consequently there can be no recovery of punitive damages.

To be more specific on another phase of the question: Was the wrong complained of committed in interstate commerce? In other words, was the wrongful act of the agent committed before the telegram was received into

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the channel of interstate commerce, and before it had become interstate in character? If the act of the agent was wholly disconnected with interstate commerce, then, of course, liability could be predicated upon the state law which allows punitive damages without the sanction of the master. We think the transaction between appellee and the telegraph agent was in interstate commerce, because the message offered, the subject-matter about which the alleged wrong was committed, was an interstate message; and, while it had not been actually accepted by the agent for transmission, still his refusal to receive it was the act of an interstate agent in violation of a federal duty, with reference to an interstate matter, thus making it interstate in character; and to allow the infliction of punitive damages for his act would be in conflict with the federal rule, which allows only actual damages in such cases unless the act is authorized or ratified by the master. Since punitive damages are not here recoverable under the federal law, and no actual damages were proved, it follows that no recovery can be had in this case.

It has been held by the United States supreme court that penalities under a state statute for a refusal to receive interstate shipments of freight could not be recovered, because such right would be in conflict with the federal rule under the Commerce Act (U. S. Comp. St., section 8563 et seq.), *So. Ry. Co.* v. *Reid,* 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; *W. U. Tel. Co.* v. *Peter Boegli,* 251 U. S. ——, 40 Sup. Ct. 167, 64 L. Ed. —— (Jan. 12, 1920); *So. Ry. Co.* v. *Prescott,* 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836.

The judgment of the lower court accordingly is reversed, and judgment here for appellant.

Reversed and judgment here.

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CONNER v. STATE.

[83 South, 684, In Banc. No. 20798]

In this case there was a motion to set aside a former judgment of reversal, and determine the case on its merits; the former judgment was set aside, and the judgment affirmed.

For former opinion see 83 So. 86.

J. E. Harrington, for appellant

Frank Roberson, Attorney-General, for the State

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a conviction of murder followed by the death penalty. The cause was submitted to this court on a former day and affirmed, no briefs being then on file by either the appellant or the state. The cause now comes on to be heard on the joint request of counsel for the appellant and the attorney general that the former judgment be set aside and the cause determined on its merits, counsel for the appellant filing with the motion his brief on the merits. The motion to set aside the former judgment will be sustained and since, after a re-examination of the cause in the light of the appellant's brief on the merits, we find no error in the rulings of the court below complained of, the judgment of the court below will be again affirmed, and Friday the 26th day of March, 1920, fixed as the date for the execution of the sentence.

Affirmed.

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STEELE v. STATE.

[83 South. 725, In Banc. No. 20798.]

CRIMINAL LAW. *Prosecution for having obtained food and lodging with intent to defraud barred in four years.*

Where the offense of obtaining food and lodging with intent to defraud was committed in the year 1915, and the prosecution was not commenced until the year 1918, the accused being within the jurisdiction of the court, not hiding, nor absconding, nor fleeing from justice, such a prosecution was barred by limitation.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, Judge.

J. M. Steele was convicted of obtaining food and lodging with intent to defraud the owner of a hotel, and appeals.

The facts are fully stated in the opinion of the court.

J. H. O'Neal, for appellant.

N. T. Currie, assistant attorney-general, for the state.

HOLDEN, J., delivered the opinion of the court.

The appellant, J. M. Steele, was convicted on an affidavit charging that he obtained food and lodging with the intent to defraud the owner of the hotel. The prosecution was based upon chapter 137, Laws of 1912.

This appeal assigns several grounds for reversal, and we agree with counsel for the appellant that there are many reversible errors in the record. However, we deem it sufficient to point out but one which will dispose of the case. The affidavit, as well as the proof in the case, shows that the alleged offense was

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committed in the year 1914, and the prosecution was not commenced until the year 1918, the accused being within the jurisdiction of the court, not in hiding, nor absconding, or fleeng from justce; consequently the prosecution was barred by limitation.

Reversed and appellant discharged.

GRAY ET UX v. GRAY.

[83 South. 726, In Banc. No. 20952.]

1. HABEAS CORPUS. *After judgment awarding custody of infant to parents, courts cannot require them to permit child to visit grandparents.*

After awarding the custody of a child to the party entitled thereto, the judge in a writ of *habeas corpus* trial is without power to direct the manner in which such party shall exercise his lawful authority over such child or to direct that he shall thereafter surrender, though temporarily, the custody thereof to another party.

2. SAME.

The judge does not merely, because he presided in a *habeas corpus* trial in which the right to the custody of a person was determined, thereby acquire perpetual jurisdiction over the custody and welfare of such person, when the order entered by him either freeing the person from restraint or awarding his custody to the party entitled thereto has been executed, the judge's jurisdiction in the matter is at an end unless and until it is again invoked by the issuance of another writ of *habeas corpus*.

APPEAL from the chancery court of Madison county. HON. LAMAR F. EASTERLING, Chancellor.

Habeas Corpus proceeding by Frank Gray and wife against Dick Gray. From an order entered after decree awarding custody of child to petitioners which required petitioners to permit the child to visit defendant, petitioners appeal.

The facts are fully stated in the opinion of the court.

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E. E. Harrell, for appellant.

We think the chancellor exceeded his authority by entering in vacation, decrees materially changing his former decree, especially in view of the fact that no notice was given the parties, and no proof was offered, we are not unmindful of the fact that the chancellor has power to make temporarry decrees, but the original decree in this case was not of that nature, but final, with all the incidents that attach to such or any other decree, and was beyond the power of the chancery court, or any other court to amend, vacate, annul or modify in any respect except as provided by law. See *Ex Parte Stanfield,* 98 Miss. 214.

When the original decree was signed and entered on the court minutes, at the regular may term, it then became a final decree, beyond the power of the chancellor to recall or modify, in the manner authorized by section 1016 of the Code of 1906, on the ground of fraud.

The judgment herein complained of are not sought to be changed in either of the ways indicated. The decree rendered June 28th and that of July 12th, were rendered in vacation without notice to the interested parties and without proof of any facts. The effect of these decrees is to reverse or annul the former or final decree. We think this was error. See *Anderson* v. *McInnis,* 99 Miss. 823.

The original decree recites: "The court doth find that the said parents are fit and capable persons, willing and able to raise and maintain their said child, and under the law should have the care and custody of their said son."

The decrees herein complained of destroy the original finding, by depriving the parents of the custody of their child. A parent's right to the custody of his child, if a fit and capable person, are so well settled, we need not cite authorities to this court.

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Again, the last decrees alternate the custody between parents and grandparents for a period of thirty days. This practice is condemned in the case of *Turner* v. *Turner*, 93 Miss., where the court said through Chief Justice WHITFIELD: "No child of that age should have his custody alternatively shifted, especially where the mother is living and a competent person to care for the child."

In view of facts presented by this record, and the many decisions of our courts, we respectfully submit that the two last decisions of the chancellor should be set aside and the original decree re-instated.

T. S. Wart, for appellee.

No brief of record for appellee.

SMITH, C. J., delivered the opinion if the court.

On the 29th day of November, 1918, Frank and Mary Gray, who are husband and wife, filed a petition with the Hon. Lamar Easterling, chancellor of the Fifth chancery district, alleging that their lawful child, James B. Gray, then about five years old, was unlawfully detained from them by Richard Gray, the child's grandfather, and praying for the issuance of a writ of *habeas corpus,* and that the custody of the child be awarded to them. The cause proceeded regularly to trial, resulting in an order reciting:

"That the said parents are fit and capable persons, willing and able to raise and maintain their said child, and under the law should have the care and custody of their said son. It is therefore ordered, adjudged, and decreed that the said Frank Gray and Mary Francis Gray shall have the care, custody, and keeping of said child free from any interruption or interference of the said Dick Gray or the wife of Dick Gray, the grandpar-

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ents of said James Gray. It is further ordered that the parents shall allow the grandparents to visit said child, and the said child shall be sent to visit its grandparents, but the said grandparents shall refrain from any act or word that will tend to entice, decoy, or in any way estrange the affection of the said child toward its parents, or cause him to leave the parents' home.

On July 9, 1919, the chancellor, in vacation issued an order to Frank and Mary Gray "to deliver the child . . . to its grandfather, Richard Gray, so as to allow said child to visit his grandfather for a period not to exceed thirty days," and "to comply with this and the former order herein, and upon failure to do so the child will be taken from you and you will be dealt with as for contempt." This order, in so far as the record discloses, was issued without any application therefor, either written or verbal. It was communicated to Frank and Mary Gray, but was not obeyed by them. On July 9th Richard Gray filed with the cancellor a petition reciting the failure of Frank and Mary Gray to obey the order directing them to deliver the child to him and to permit it to remain with him for the period of thirty days, and prayng that they be cited to appear and show cause why they should not be punished for a contempt of court. The chancellor directed the citation to issue pursuant to this petition, returnable to him on the 12th day of July, at which time after hearing the evidence he entered an order reciting:

"That if the defendants herein shall deliver the custody of James B. Gray, age five years, minor, to its grandparent within three days from this date for a thirty-day visit, and pay the cost of this proceeding to be taxed by the clerk, the proceeding for contempt shall stand dismissed. Upon failure to comply with this decree and the other decrees, as stated, then the court upon proof of such failure shall enter such further

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decree punishing said defendants as may seem right and proper. That at the expiration of the thirty-day visit said child is to be returned by its grandparents to its parents."

Afterward on petition of Frank and Mary Gray the chancellor granted them an appeal to this court.

While this appeal is from an order entered by a chancellor the jurisdiction of the chancery court, or of the chancellor exercising the powers therof in vacation, over subject of custody of children is not here involved; for when inquiring into the cause of the detention of a child brought before him on a writ of *habeas corpus* issued pursuant to the provisions of chapter 62, Code of 1916 (chapter 33, Hemingway's Code), a chancellor's powers are those only that can be exercised by the judge of any other court before whom such a writ is returnable, are measured by section 2461, Code of 1906 (section 2027, Hemingway's Code), and are to either set the child at liberty or award its custody to the party entitled thereto. After awarding the custody of a child to the party entitled thereto, the judge in a *habeas corpus* trial is without power to direct the manner in which such party shall exercise his lawful authority over such child, or to direct that he shall thereafter surrender, though temporarily, the custody thereof to another person. The judge does not, merely because he presided in a *habeas corpus* trial in which the right to the custody of a person was determined, thereby acquire perpetual jurisdiction over the custody and welfare of such person. When the order entered by him either freeing the person from restraint or awarding his custody to the party entitled thereto has been executed, the judge's jurisdiction in the matter is at an end unless and until it is again invoked by the issuance of another writ of *habeas corpus*.

The order appealed from will be reversed, and the cause dismissed.

Reversed and dismissed.

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BLACKLEDGE *v.* SPIKES.

[83 South. 729, In Banc. No. 20963.]

EQUITY. *Chancellor's action in appointing master to state relatively simple account will not be reversed.*

In a suit to have a deed absolute on its face declared a mortgage and cancelled though the accounts presented do not appear to be complicated or difficult of accurate ascertainment, the chancellor's action after holding with the complainant, in appointing a master to make and state on account will not be reversed.

APPEAL from the chancery court of Harrison county. HON. W. M. DENNY, JR., Chancellor.

Suit by Mrs. A. L. Spikes against W. L. Blackledge. From a decree for complainant, defendant appeals and complainant cross appeals.

The facts are fully stated in the opinion of the court.

T. M. Evans, for appellant.

Mize & Mize, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The appellee, Mrs, Spikes, filed a bill in the chancery court to have a deed executed by her to the appellant declared a mortgage and canceled. She alleges that the deed was given to the appellant as security in consideration of the appellant's making a bond for the son of the appellee, who had been convicted of a crime and sentenced to pay a fine of two hundred and fifty dollars and to serve a term of imprisonment, from which judgment he appealed with *supersedeas* to the supreme court (*Spikes* v. *State,* 98 Miss. 483, 54 So. 1-, and that the cause was reversed and remanded, and thereafter

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the cause in the circuit court was *nol prossed,* no liability accrued to appellant by reason of said bond. That it was understood between the parties that the deed, though an absolute conveyance in form, was in reality a mortgage to secure the appellant from liability on said bond, and by reason of the subsequent course of events the said deed became null and void, but that the appellee, the complainant below, had recently discovered that the appellant was asserting some claim of title thereto. The deed was signed by Mrs. Spikes and her husband, and it is alleged that since signing, the husband had died and the appellee became the sole owner of said property. The defendant filed an answer in which he denied the allegations of the bill and set up that he had bought the land embraced in the deed, and that he had paid the consideration therefor, and denied that the deed was taken as security as alleged in the bill. There was evidence for the complainant which tended to prove that the deed was taken as security for certain moneys advanced and to be advanced to Mrs. Spikes on account of the litigation in the prosecution of her son's appeal to the supreme court. It appears that a separate instrument was executed, known as a bill of sale conveying certain personal property to Blackledge, as security for making the bond of appellee's son. It appears that the bond actually made by the appellee's son and signed by the appellant was a bail bond, and not an appeal bond, and that the appeal was prosecuted by making an affidavit of proverty. It appeared from the testimony of appellant that he had advanced various sums of money for the appellee, and that some of this money was paid to an attorney, and some of it was paid to witnesses summoned on behalf of appellee's son in the criminal prosecution.

The chancellor on the hearing held the deed to be a mortgage, and ordered same canceled, but he appointed a master in chancery to make and state an

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account of the moneys advanced by the appellant, to be reported back to the court for final action, and granted an appeal to settle the principles of the case.

Some of the testimony introduced by the complainant was admissions by the appellant tending to show that the land belonged to the appellee, and that he had no claim against it, and other admissions by which he claimed to third persons that the land was held as security for certain money. It is unnecessary to go into the details of the evidence. The chancellor had abundant evidence to warrant him in believing that the deed was executed as a mere security for the money advanced and to be advanced by the appellant. The chancellor's action in appointing a master to state an account is challenged on cross-appeal. While the accounts presented to do not appear to be complicated or difficult of acurate ascertainment, still we see no reason to reverse his action and cross appeal will be affirmed, and the cause remanded to be proceeded with in the court below.

Affirmed and remanded.

DAVENPORT v. STATE.

[83 South. 738, In Banc. No. 21100.]

1. CRIMINAL LAW. *Competency of evidence not objected to will not be reviewed.*

   The supreme court will not pass upon the competency of evidence introduced in the lower court without objection.

2. CRIMINAL LAW. *Improper instructions shown to have influenced verdict of jury.*

   Testimony of jurors on motion for new trial, not objected to, is held by the court in this case to have influenced the verdict of the jury.

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3. CRIMINAL LAW. *Giving of unrequested instructions.*
Under section 793, Code 1906 (Hemingway's Code, section 577) so providing, the trial judge is forbidden to give an instruction not requested by either party.

4. CRIMINAL LAW. *Giving of instruction after argument has begun.*
It is error for the trial judge to give an instruction after the argument to the jury has begun.

APPEAL from the circuit court of Tishomingo county.
HON. C. P. LONG, judge.

N. C. Davenport was convicted of unlawfuly selling intoxicating liquors and appeals.

The facts are fully stated in the opinion of the court.

Bennett & Clark, for appellant.

Section 793, Code of 1906, says the Judge in any cause, civil or criminal, shall not sum up or comment on the testimony or charge the jury as to the weight of evidence, but at the request of either party, he shall instruct the jury upon the principles of law applicable to the case.

In the case of *Montgomery* v. *The State,* 85 Miss. 330, 38 So. 335, the supreme court in passing on, and construing said section of the code referred to and the facts of which were as follows: The record history of this instruction shows that it was had of the court by counsel for the state during the argument for the defendant, whose counsel were in entire ignorance of it, and that it was for the first time, produced by the counsel for the state in his closing argument to the jury, telling them that he had gotten instructions from the court to answer the argument of counsel for the defense, who immediately objected and excepted to this practice. The court remained, silent. It is true that the state's attorney then said "counsel may answer the instruction now."

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This proceeding was not good practice, and not cured by the remark of the state's attorney, action on which might have required the re-shaping of the whole argument. The court may grant instructions any time before the jury retires, but not secretly. Other counsel interested should know of it, even though they have to be stopped in arguing.

The court says further in the opinion that the correct practice under our system is for the court to pass on all instructions asked on both sides before the argument of the jury begins. The court in its opinion says further that a court should so deport itself as, that no juror or bystander can surmise its view of the facts. It is an unbiased jury alone which should pass on the facts, and this on the theory of the law, in Mississippi, is designed for the protection of innocence which is presumed of all men, until disproved in the legal mode on a fair and impartial administration of equal and exact justice.

In the case of *James* v. *The State,* 63 So. 669, the supreme court says: "Under the system of judicial procedure in Mississippi, it is not in the province of the judge to give instructions to the jury, unless one of the parties request him to do so and present to him in writing, the desired instructions. He is not permitted to instruct the jury at his own instance." In the case of *Johnson* v. *The State,* 63 So. 338, the court lays down the same proposition as laid down in the case of *James* v. *The State,* above cited.

In the case of *Dixon* v. *State,* 64 So. 468, the court says: "No instruction was asked by either the state or the defendant requesting the court to define the crime of murder, and therefore, under section 793, of the Code, it was without authority to so instruct," and the court further says, in this opinion, that "if there is any merit in appellant's third objection, it would be that section 793, of the Code should be repealed."

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The following cases, hold that the judge has no authority of his own motion and without request from either party to instruct the jury, and that if he does so, it is reversible error, and violative of the provisions of section 793 of the Code of 1906. *Pringle* v. *State,* 108 Miss. 802; *Watkins* v. *State,* 60 Miss. 323; *Boykin* v. *State,* 86 Miss. 481.

But without these authorities above cited relative to the power of a judge to instruct the jury, the said section 793 of the Code speaks for itself. And that is, at the request of either party, he shall instruct the jury upon the principles of law, applicable to the case, and that all instructions asked by either party must be in writing, and all alterations and modifications of instructions given by the court, or refused shall be in writing. Showing that the court can only modify or alter instructions as requested. The court's explanation as to his reason for giving the instruction does not cure the defect or change the law as laid down. And even if counsel for the defendant had argued to the jury as set forth in the court's reasons for giving that instruction, that does not give the court the right to do what he did in this case.

The district attorney is the party who represents the state and it is his duty to request instructions for the state and should the district attorney even fail to do his, that doesn't give the court the right and the power to instruct the jury.

We respectfully submit, that if this case is affirmed on the record above that this court will reverse all its former holdings and absolutely repeal section 793 of the Code of 1906.

We respectfully submit that this case should be reversed and remanded.

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T. M. Currie, Assistant Attorney-General for the state.

The appellant was convicted by the jury and after his conviction some of the jurors who tried the case were examined on a motion to set the verdict aside and have a new trial, and testified that they did not know whether they would have voted for a verdict of guilty without the instruction, saying that it was doubtful if they would have done so.

The action of the court in granting this instruction *sua sponte* is the vital error assigned.

The state regrets that it is unable to bring itself to the conclusion that this action of the court was not error. The matter of the granting of instructions seems to be absolutely fixed in our statute. The record and the case are respectfully submitted.

ETHRIDGE, J., delivered the opinion of the court.

The appellant was indicted in a justice of the peace court for unlawfully selling vinous, malt, spirituous, alcoholic, and intoxicating liquors. The date of the offense was charged in the affidavit to be the 8th day of February, 1919. There was a conviction in the justice court and an appeal taken to the circuit court, where appellant was again tried and convicted and sentenced to pay a fine of one hundred dollars and serve sixty days in jail, fifty dollars of the fine to be suspended during good behavior. During the first part of the trial the state adhered to one sale, but during the course of the trial introduced evidence of other sales. There was only one witness to testify to the sale, and this witness got confused as to the dates, and testified to two different dates. The district attorney contented himself with one charge, which read:

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"The court charges the jury for the state that if you believe from the evidence beyond a reasonable doubt that the defendant sold Bud Estes liquor as charged in the affidavit, then you will find him guilty as charged."

The defendant asked two charges, reading as follows:

"The court charges the jury for the defendant that the state must prove to the satisfaction of the jury beyond a reasonable doubt that the defendant sold the liquor as alleged in the affidavit and unless so proven it is your duty to find defendant not guilty."

"The court charges the jury for the defendant that the state of Mississippi must prove the guilt of the defendant beyond every reasonable doubt, and, unless the state proves every material allegation in the affidavit, it is your duty to find the defendant not guilty."

The alleged sale to Estes was proved by one witness, and the defendant denied making such sale, and the case was submitted on the above instructions and argued to the jury by attorneys on each side. At the close of the argument in this case and before the jury retired, the court, of its own motion, wrote out a charge for the state and handed it to the district attorney, charging the jury that—

"If you believe from the evidence beyond a reasonable doubt that the defendant sold the witness Estes whiskey at any time within two years before the date of the making of the affidavit, then it was the duty of the jury to find him guilty as charged."

The court states in the record: "The reason the court did this of its own motion was because counsel for the defendant in his argument argued to the jury that under the instructions of the court the sale had to be made to this witness on the 8th day of February, the date charged in the affidavit, and that, although the jury might believe the sale took place at any other time than that, the jury would be compelled to turn the defendant loose. The jury having retired before this

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charge was given to be read to them, they were brought back and the charge read to them, and counsel for the defendant was then given an opportunity to reargue the case if they desired."

This was objected to and exception taken. On motion for a new trial two jurors were introduced with reference to the effect the giving of this instruction had upon them with reference to the verdict. The first juror in answer to a question as to the court's giving the instruction and what effect it had on the verdict said:

"A. As well as I remember, we were called back. Q. What was then done? A. That changed my mind on it some.

"Q. Without that instruction of the court granted of its own motion, would you have been for conviction? A. I don't think I would. One swore he did, and one swore he didn't.

"By the Court: Q. Do you mean to say you went out and convicted this man without any evidence because the court gave you an instruction as to what the law was? A. No, sir; because it was mixed, two cases."

Another juror was asked:

"Q. Do you remember whether or not after this case had been submitted to the jury and argued by counsel for both the state and the defendant that the court of its own motion and without request granted an instruction to the jury? A. Yes, sir.

"Q. What effect, if any, did that instruction have on you with reference to returning your verdict in this case? A. The instruction he gave, I was unsettled on it because they had come up and disputed on the sale of the whiskey, I didn't know which one of them to stand on, whether either one of them or not, and after he gave that charge, deciding any time in two years, I agreed for the verdict to be guilty.

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"Q. But for that charge would you have been for a verdict of guilty? A. No, sir; I think not."

This evidence was introduced without objection, and we are not called to pass upon its competency, but it shows what might reasonably be presumed without evidence, that the instruction had an influence upon the verdict of the jury unfavorable to the defendant. The giving of the instruction above set out was erroneous for two reasons: First, because section 793, Code of 1906 (section 577, Hemingway's Code), as construed by the previous decisions of this court, forbids the judge giving an instruction not requested by either party. *James* v. *State,* 106 Miss. 353, 63 So. 669; *Johnson* v. *State,* 106 Miss. 94, 63 So. 338; *Dixon* v. *State,* 106 Miss. 697, 64 So. 468; *Pringle* v. *State,* 108 Miss. 802, 67 So. 455; *Watkins* v. *State,* 60 Miss. 323; *Boykin* v. *State,* 86 Miss. 481, 38 So. 725. In the second place, the practice of giving instructions after the argument has begun has been condemned by this court in several cases. *Montgomery* v. *State,* 85 Miss. 339, 37 So. 835; *King* v. *State,* 83 So. 164; *Boykin* v. *State,* 86 Miss. 481, 38 So. 725.

For the errors indicated, the judgment is reversed, and the case remanded.

Reversed and remanded.

RALEY ET AL. v. RALEY ET AL.

[83 South. 740, In Banc. No. 20972.]

DEEDS. *Conveyance to wife alone despite warranty to her children.*

The court held in this case that the deed set out in its opinion was a conveyance to the wife alone, and not to her and the grantor's children, despite the covenant of warranty in the deed to defend title to her "and my children" such words of warranty not being words of grant.

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APPEAL from the chancery court of Lauderdale county.
HON. G. C. TANN, Chancellor.

Suit by E. Raley and others against J. H. Raley and others. From a decree for defendants, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

Jno. W. McCall, for appellant.

As shown by the pleadings outlined above, the appellants assign as error herein (1) an erroneous construction of this deed from A. J. Raley to Jane Raley and (2) the erroneous distributive share awarded appellants two questions in their order. We will discuss the two questions in their order. This brings us to a construction of the deed. In construing a deed we lay down as a universal rule followed by the courts:

1st. The court will ascertain the meaning and intent of the grantor by the meaning and intent of the words employed by the grantor in the instrument. That is to say, the court will follow the meaning of the words only.

2nd. The court will, in case of conflicting terms, try to harmonize the entire writing.

3rd. If there are conflicting clauses which cannot be harmonized then the operating or conveying clause will be put into full force even to the exclusion of the recitals, etc. *Miller* v. *Board of Supervisors,* 7 So. 429; *Dunbar* v. *Aldrich,* 31 So. 341.

In this deed in question the opening clause is plain and forceful. The entire consideration is the consideration from the grantor's wife, to-wit, five dollars cash and, second, his love and affection for her—absolutely no consideration from or to the grantor's children. The operating or conveying clause is as direct, simple and forceful as a deed in fee simple can be drawn. The grantor more than one time employed the words to Jane Raley "forever;" the warranty clause is simple,

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as the grantor undertakes to warrant unto Jane Raley, forever, the property in question but in concluding this warranty clause the grantor adds the words "my children." Nowhere in the deed is there a mention of his children except in the concluding part of the warranty clause. While it would be an easy matter to cite a vast list of cases supporting the contention of appellants we feel that the case of *Dunbar* v. *Aldrich,* 31 So. 341, is decisive of this question and it needs no further argument.

Therefore we urge, if the court please, that the decree of the chancellor is erroneous first in the construction placed thereon, and second that regardless of the construction of this deed the interest awarded to complainants and especially Ellis Raley is erroneous and that proper judgment should be entered here accordingly and the cause remanded with directions to sell.

M. V. B. Miller, of counsel for appellee.

The chancellor below took the view that the construction placed upon the deed by appellees was the rightful one. It has been the uniform policy of this court to uphold the findings of the chancellors unless they were clearly and manifestly wrong, and this is true even in those cases where the supreme court would have found differently if they had been passing on the questions involved.

The burden of showing that the chancellor erred is upon the appellees to show this clearly, and unless they have met this burden, this court will uphold the decision of the lower court. Appellees claim that appellants have failed to meet this burden and that the record, as it now stands, shows that if the lower court committed the error, it was error of which appellants cannot be heard to complain, because it was in their favor.

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The court will effectuate the lawful purpose of deeds, as it will of all other instruments, if this can be done consistently with the principles and rules of law applicable..

The primary rule to be observed, therefore, is that the real intention of the parties is to be sought and carried out whenever possible, and statutes to that effect are found in many jurisdictions. All rules of construction are simply means to a given end being those methods of reasoning which experience has taught are best calculated to lead to the intention, and generally no rule will be adopted that leads to the defeat of the intention. So whatever may have been the earlier doctrine, it is now thoroughly settled that technical rules of construction are not favored, and must not be applied so as to defeat the intention. In modern times the more sensible rule obtains, in all cases to ascertain and give effect to the intention of the parties as gathered from the entire instrument, together with the surrounding circumstances. 8 Ruling Case Laws, page 1037. *Williams* v. *Calbourne,* S. & M., ch. 355; *Williams* v. *Clabourne,* 7 S. & M. 488; *Goosey* v. *Goosey,* 48 Miss. 210; *Hart* v. *Gardner,* 74 Miss. 153; *R. R. Co.* v. *Traction Co.,* 100 Miss. 282.

The cardinal rule in the construction of written instruments is to give the words of such instruments their ordinary and grammatical meaning, and then gather from the entire instrument the intent of the parties. *Goosey* v. *Goosey,* 48 Miss. 210.

The general rule that if there be earlier clauses in a deed, repugnant to latter clauses, the latter shall prevail does not apply where the inconsistent clause can be made to harmonize with the general purpose of the parties as derived from the whole instrument: *Goosey* v. *Goosey,* 48 Miss. 210.

This court said further in the Goosey Case "The whole contract must be considered, in determining the

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meaning of its separate parts, so that, if practicable, harmony and congruity may be attained. The parties make the entire contract, and must be supposed to have the same general purpose and object in view in all its parts; if, therefore, some of the stipulations are more obscure than others, if one part is seemingly inconsistent with another, the main purpose and object may be so clear and distinct as to afford light upon those parts which are less so. It was very felicitiously expressed by Lord ELLENBOROUGH, in *Barton* v. *Fitzgerald,* 15 East. 541: "It is a true rule of construction that the sense of the parties, in any particular part of an instrument, may be collected *ex antecedentibus et consequentibus.*" Every part may be brought into action to collect from the whole one uniform and consonant sense, if that may be done. So it was laid down in *Duke of Northumberland* v. *Fitzgerald,* 5 T. R. 522. "It is immaterial in what part of a deed a particular covenant is inserted, for in construing it we must take the whole deed into consideration, in order to discover the meaning of the parties."

"It is urged by the appellants that the earlier clauses of the deeds gave an estate for life in the usufruct of the property to the mother, remainder to her children; that this intent is plain and they invoke the rule, that if there be in a deed earlier clauses, which are repugnant and inconsistent with the latter ones, the former shall prevail (Shep. Touch. 88 2 Pars. Cont. 513). Therefore, the conclusion is reached that such an estate, in remainder to the children, is inconsistent with the later covenant, that if Mrs. Goosey dies before her husband, she may dispose of the property by a will. The rule invoked applies in a proper case; if indeed the inconsistency be not so great as to avoid the deed for uncertainty. But such an election shall not be made between inconsistent covenants and clauses, if they can be made to harmonize with the general purpose and

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scheme of the parties as deprived from the whole instrument."

And also this court held in *Robinson* v. *Plaine,* 58 Miss. 692: "That the *habendum* clause in the deed could not convert an estate in fee simple passed by the granting part of a deed into the lessor estate." This rule of construction was applied in that case because the deed expressed two repugnant intentions—the one or the other had to give way and the court held that this was a proper case for the application of a fixed rule of construction, but the court said further in that case, that rules of construction must give way where the deed shows the intention of the parties and that such intention of the parties must prevail whether it be discovered in the first or the last clause of the deed," and in *Morgan* v. *Morgan,* 8 A. & E. Ann. Cases, 943, the court held that "where a deed contained two inconsistent provisions, one indicating that a life estate only was intended to be conveyed to a person and the other given or granting to such person an absolute and unlimited power of alienation and disposition of such estate in fee simple, would be held to pass a life estate or the fee simple as the one or the other may appear to be the primary intention disclosed by a consideration of the whole instrument."

One of the errors of counsel for appellants in the trial of the case in the lower court is that he assumed that the first paragraph of the deed is the granting clause and that the second paragraph of the deed in question is an *habendum* clause or a clause in explanation of first clause. Upon close examination of this deed it is perfectly manifest that both the first and second paragraphs of the deed are granting clauses; that the second paragraph of the deed begins: "I do hereby grant, bargain, sell and transfer and convey all my right, title, property and interest in and to said personal property, said mixed property and to said

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lands forever, etc." If the words "grant, bargains, sell, transfer and convey" or words of similar import did not occur in the first paragraph at all, it would make no difference under this particular deed, because of the wording and terms of the second paragraph of said deed.

And under the authority of the *Goosey case* and the *Robinson case, supra,* this court must harmonize the two paragraphs and give meaning to both, and then the only rational conclusion to be reached is the one reached by the chancellor in construing this deed.

It is further a rule of construction that where a deed is drawn uniformly, not prepared by lawyers or persons familiar with the usual manner of transacting legal business, that the same strict rules of construction are not applied. *Everson* v. *Webster,* 3 S. E. 382, 44 A. S. R. 892; *Flagg* v. *Eames,* 40 Vt. 16, 94 A. Decisions, 363. The only authority cited by counsel to sustain his contention is, *Dunbar* v. *Aldrich,* 79 Miss. 698, 31 So. 341.

The rule announced in the Aldrich case is not in conflict with the rule announced in the Traction Co. case, the Hart case and the Clabourne cases. The rule in the Aldrich case is merely a rule of construction and not a rule of positive law and must yield to the rule that the intention of the parties is drawn from the whole deed. *Johnston* v. *Barden,* 1915 A. American Annotated cases 1243; *Atkinson* v. *Sinnott,* 67 Miss. 502.

Counsel for appellants cites the Aldrich case which holds that the operative part of the deed cannot be controlled by recital of other parts of the instrument. We did not think that this case is in point in the case at bar for the reason that clearly the last paragraph of the deed in question is just as truly a conveying paragraph as the first paragraph. It shows plainly that this man Raley, intended and did convey this land to his wife and his heirs, meaning thereby what anyone else

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would mean, using the word "heirs" in a deed, his wife and his children and not her children. What other rational conclusion can be reached without cutting out of the deed the last paragraph? If the grantor did not want the last paragraph in the deed, what was his reason for placing it there.

Under the authority of the *Morgan case, supra,* which shows that where there are two inconsistent provisions in a deed—one passing a life estate, the other a fee simple, that in construing such deed, it will be held to pass a life estate only if it appear that this was the primary intention of the grantor. There can be no doubt that in construing the deed in the present case, which contains two inconsistent provisions, that the latter provision in which title to said property is conveyed to his wife and heirs, should be given effect If it appears from the deed as a whole and from the surroundng circumstances that this was the primary intention of the grantor.

Under authority of the Hart case and the Traction Co. case, there was only one rational conclusion for the chancellor to reach in construing the deed in the present case and that was the conclusion reached.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a decree rendered in a partition proceeding. A. J. Raley, a widower with several children, married a widow who will hereinafter be referred to as Jane Raley, who also had several children, of which marriage one child was born. Raley died in 1913 seized and possessed of certain land, and prior to his death he conveyed other land then owned by him by the following deed:

"I, A. J. Raley of said county and state, in consideration of five dollars to me paid by Jane Raley, and in consideration of the love I entertain for her, for said

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consideration taken singly and for both considerations taken together, recognizing two considerations, either of which I regard as ample, and sufficient within itself —were it not for the other—I do grant, bargain, sell, transfer and convey to the said Jane Raley, who is of said county and state, forever, the following property, to wit:

"All my personal property of every description whatsoever and all my mixed property and the following lots, tract and parcels of land: Southwest quarter of southwest quarter, section 25, Township 5, and range 17 East. Northwest quarter, Northwest quarter, section 36, Township 5, Range 17 East, thirty acres in Southeast quarter of Southeast section 26, Township 5, Range 17 East.

"Said land is situated in district 5 of said county and state.

"I do hereby grant, bargain, sell and transfer and convey all my right, title, property and interest in and to said personal property, said mixed property and to said land forever. The same is incumbered, and I have the right to convey it and do hereby convey it for the consideration as above set forth and do hereby covenant with the said Jane Raley warrant and forever defend the title to said land and the other property against all legal claims whatsoever and in connection with the said Jane Raley, I do also for the love I entertain for my children covenant with her and my heirs to warrant and forever defend the title to said land and the other property to them, that is to Jane Raley and my children.

"Signed, sealed and delivered on this the 17th day of January, 1896. A. J. RALEY.

Jane Raley died in 1915, and thereafter this proceeding was instituted for a partition of the property hereinbefore referred to; the complainants therein being the children of Mrs. Raley, including the child born of her second marriage, and the defendants therein being the children born of Raley's first marriage.

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The sole question presented by this appeal for our determination is, does the deed hereinbefore set out convey the property therein described to Jane Raley alone or to her and the grantor's children?

Mrs. Raley is the sole grantee in the granting clause of the deed, but the contention of her husband's children is that the intention of the grantor must be collected from the whole deed, and that the words "I do also for the love I entertain for my children covenant with her and my heirs to warrant and forever defend the title to said land and the other property to them, that is to Jane Raley and my children," indicates that Raley intended to convey the property to Mrs. Raley and his children. These words appear in the covenant of warranty and it is impossible to determine what the grantor meant thereby, but they cannot be held to convey any interest in the property to his children, for the reason that they are not words of grant; such words, in some form, being absolutely essential to the passing of an estate by deed. The conveyance is to Jane Raley alone.

The court below having decided the case on the theory that this deed conveyed an estate to Jane Raley and the grantor's children, its decree must be reversed and the cause remanded.

Reversed and remanded.

PEGRAM v. STATE.

[83 South. 741, In Banc. No. 21072.]

HIGHWAYS. *Members of board of supervisors not liable criminally for voting to pay contractor's claim.*

A member of the board of supervisors was not liable criminally for voting to pay the claim of a contractor for working the

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roads, though he had not worked the roads in accordance with the plans and specifications, where the supervisor did not act fraudulently, corruptly or through bad faith, but under the belief that the board had power to pay the claim at that time, as he was acting judicially.

APPEAL from the circuit court of Tippah county.

HON. C. LEE CRUM, Judge.

Samuel W. Pegram was convicted of an offense and appeals.

The facts are fully stated in the opinion of the court.

Thomas E. Pegram, for appellant.

If any offense is charged by the indictment, or any offense is shown to have been committed by the appellant, it is of course, a statutory offense; and the state seeks to punish the appellant for an alleged violation of section 344 of the Code of 1906, or section 3717, Hemingway's Code, section —, 112 Miss. 125.

The case of *Paxton* v. *Baum,* 59 Miss. 531, is probably more helpful in placing a proper construction on the above section than any other decision of this court. This decision was rendered on the law as embraced in the Code of 1871 and since there have never been any material modifications of that law by the legislature, nor any different construction placed thereon by the court, as to the civil or criminal liability of a member of the board of supervisors, the construction of the statute, having prevailed for more than forty years, should still be the law in this state.

It is well to compare the sections of the Code of 1871, pertaining to the liability of a member of the board of supervisors, to those sections of the Code of 1906, on the same subject, and that is here done Section 1386 of the Code of 1871 provided that, if the board of supervisors should appropriate money to any object not authorized by law, the members thereof

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should become liable personally (civilly), etc., and this section has become and is now section 346 of the Code of 1906 with only slight change in phraseology and no change in substance or effect.

Section 1382 of the Code of 1871 is the same as section 343 of the Code of 1906 except that the latter section has in the course of time had added to it the provision that any illegal allowance may be inquired into by proper tribunal upon legal proceedings for that purpose.

Section 1379 of the Code of 1871 is identical with section 344 of the Code of 1906, which is the section on which the indictment in this case is founded. Each section provides that no person shall claim or receive any compensation not authorized by law, and that if any member of the board knowingly votes for the payment of any such unauthorized claim, or any appropriation not authorized by law, he shall be subject to indictment, etc.

In view of the fact that the legislature has never seen fit to amend these sections since the decision in the *Paxton case supra,* it is evident that the construction placed on the section by that decision has, all along met the approval of the law makers.

The construction gives the board of supervisors full jurisdiction of roads. The law under which the board of supervisors were working the roads of the district in question gave the supervisor from that district, since there was no road commissioner therefor, supervision of the roads of the district, that is, over the inspection of work done thereon, and the approval or disapproval of such work.

With the above constitutional and statutory provisions in mind the following questions, in the consideration of this case, naturally present themselves: is the claim of a contractor for work done by him on roads lawfully contracted, when approved by the supervisor whose

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duty it is to inspect the work, a claim unauthorized by law, even though in the eyes of some other person, the work might not be up to contract? Is a member of the board of supervisors liable to indictment and prosecution for a violation of the criminal law in the event he should make a mistake as to whether a contractor has complied with his contract? Can a supervisor who has inspected the work done by a lawful contractor and recommended by implication, or actually the payment of the contractor's claim be held to have violated the criminal law where the proof fails to show that he actually voted for the allowance? Is it a violation of the criminal law of this state for a member of the board of supervisors to vote for the allowance of a claim compensating a contractor for work done on a lawfully let contract, when, in the judgment of such supervisor, the allowance is warranted by the facts, even though the work may not be up to the specifications of the contract? Is not the indictment in the case at bar defective in that it fails to aver that the appellant voted with corrupt and fraudulent intent?

In *Paxton* v. *Baum, supra*, the court said in response to the suggestion of error: "But we cannot ignore the fact that supervisors, in the discharge of many of their functions are judicial officers, and especially in adjudicating upon the validity of claims against the county. A law which would make them personally liable for every erroneous judgment rendered, if constitutional, would certainly have the effect of preventing any solvent man from accepting the office."

It might be added with equal force that a law which would make a member of the board liable to fine and imprisonment for every erroneous judgment,either as to law or fact, would certainly have the effect of preventing any self-respecting or liberty loving man from accepting the office.

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It seems to be well settled that before a supervisor is subject to indictment and fine for his conduct or actions on matters within his jurisdiction, the indictment must charge and the proof must show beyond a reasonable doubt that the act was corruptly or fraudulently done. *State* v. *Baum,* 111 Miss. 31, 71 So. 50, 171 X, P, 35, p. 36; *Paxton* v. *Baum,* 59 Miss. 531; *Treen* v. *State,* 92 Miss. 756, 46 So. 252; *State* v. *Norris,* 111 N. C. 652, 16 S. E. 2; *State* v. *Kimball,* 43 Kan. 337, 23 Pac. 482; *State* v. *Skates,* 43 Kan. 330, 23 Pac. 479; *Henry* v. *Commonwealth,* 126 Ky. 103, — S. W. 37. It is true that the Paxton case was dealing more directly with section 1386 of the Code of 1871 than with section 1379, which is now section 344 of the Code of 1906, but the construction placed on the former in that decision is applicable to the latter. In both sections we find the same phrase, namely, "unauthorized by law," and what the phrase meant in one must be, necessarily, its meaning in the other, and the reasoning advanced by the court in that decision showing that a supervisor is not even civilly liable for a mistake in judgment, and is only liable when guilty of corrupt conduct only, is just as sound when the supervisor is sought to be held criminally liable.

Spight & Street, for appellant.

The appellant, S. W. Pegram, was tried and convicted in the circuit court of Tippah County, Mississippi, at the July Term, 1919 on an indictment charging him, as a member of the board of supervisors of said county, with having knowingly and unlawfully voted for an appropriation to pay a road contractor for work done on public roads in his supervisor's district, alleging that the said contractor had a valid contract to work said roads for a specified period. It will be noted that this indictment does not charge that said allow-

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ance was fraudulently and corruptly made, but only that it was done "knowingly and unlawfully." This allegation in the indictment would apply with equal force to a case of mistaken judgment, which is really the case at bar, and it is fundamental law that no judicial officer can be held criminally liable for a mistake of judgment, especially where he is clothed with discretionary powers, as is shown to be the case here. The application for the payment of this claim was for a service rendered that county peculiarly within the jurisdiction of the board of supervisors.

In the case of *Paxton* v. *Baum et al.*, 59 Miss. 531, Chief Justice CHALMERS, in delivering the opinion of the court overruling the suggestion of error, drew a marked distinction betwen voting for an appropriation corruptly made and one in which there was only a mistake of judgment, and he held by clear inference that inasmuch as the declaration in this case did not charge corruption, that question was not before the court. If it is necessary to charge corruption in a declaration in a civil action, how much greater the necessity in a criminal case? In that case a suit was brought against members of the board of supervisors on their bonds for having illegally allowed claims for work done on public roads in the county, and Judge CAMPBELL, who delivered the opinion of the court very clearly holds that the members of the board are not liable personally because the appropriations were made for objects authorized by law, and that it was not diversion of public money to an object not authorized by law, and he uses this language: It is what the money is appropriated to, and not how it is applied, that furnishes a test of personal liability for it. Objects signify the things aimed at, the end sought to be accomplished. If this is not the true interpretation of the language mentioned, members of the board of super-

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visors would be liable personally for every mistake or error of judgment, or of information as to facts whereby money was appropriated even to proper objects, if not appropriated in strict accordance with law as to every circumstance attending them." Proceeding further in the same opinion Judge CAMPBELL says: "In view of the well-settled rule of the common law that for errors or mistakes, a public officer acting judicially or quasi-judicially is not liable, it could not have been the purpose of the legislature to make members or boards of supervisors personally liable for errors or mistakes as to how to act in matters committed to such boards by law and as to objects for which an appropriation of money authorized to be made by them. It is when they disregard the law as to the objects to which it has devoted public money and diverted it to some object to which the law has not devoted it, that personal liability attaches." Following this opinion of Judge CAMPBELL, is the opinion of Chief Justice CHALMERS holding, in effect, that only where the charge is made that the money was appropriated corruptly, can there be a personal liability. In the absence of such corrupt purpose in the allegations of the indictment, no offense against the laws or judgment should have been sustained in the lower court.

The law under which this indictment is drawn finds its only foundation in section 3717, Hemingway's Code, section 344 of the Code of 1906. That section provides a penalty upon a member of the board of supervisors who shall, "knowingly vote for the payment of any unauthorized claim, or appropriation not authorized by law." According to the opinion in *Paxton* v. *Baum*, *supra*, the case at bar does not fall within the condemnation of that section of law. This is another reason why the motion in arrest of judgment should have been sustained.

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N. T. Currie, Assistant Attorney-General, for the State.

We submit that there is no escape, under law, for this appellant, upon the theory, as contended by his counsel that the appellant had official discretion, that he had a right to use that discretion in any manner he saw fit, and that if he used it in an unlawful manner, in an unlawful purpose, that he cannot be held criminally responsible for it. We deny that such is the law. On the contrary, we assert that wherever a public officer is imbued with discretion and the right of the exercise of discretion, and in exercising and using it, instead of exercising and using it honestly, and in good faith, on the contrary wilfully, corruptly, knowingly and originally missued and abused it as did the appellant in this case, and in so doing, commits a violation of the criminal laws of the state, as did the appellant in this case, he is answerable criminally.

The case of *Paxton et al.* v. *Baum et al.*, reported n 59 Miss. 531, and cited by counsel for the appellant in their brief, is not applicable to the case at bar, and is not in point as an authority, for the reason that it was decided upon section or paragraph 1386 of the Code of 1871, which we quote:

"If any board of supervisors shall appropriate any money to any object, not authorized by law, the members of such board shall be liable personally, for such sum of money to be recovered, by suit, in the name of their successors in office, or in the name of any person who is a tax payer, who will sue for the use of the board of supervisors of their county, and who shall be liable for costs in such case, but any member of the board of supervisors may be discharged from liability in such suit, by plea and proof that he voted against such unauthorized appropriation of money."

It is observed at a glance that the thing prohibited by this section was the appropriation of money by the

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board of supervisors to an object not authorized by law.

Section or paragraph 1386 of the Code of 1871, which controlled the decision of the court in the Baum case, refers to the appropriation of money to an object not authorized by law. Such is not the case at bar.

Section 344 of the Mississippi Code of 1906, in which the appellant is being prosecuted, pertains to an entirely different subject. It pertains to and prohibits any person from claiming from the board of supervisors any fee or compensation not authorized by law, and prohibits the board from knowingly voting for the payment of any such claim unauthorized by law.

Thus it is clear that the provisions of section or paragraph 1386 of the Code of 1871, prohibits the appropriation of any money to any object not authorized by law, and section 344 of the Mississippi Code of 1906, prohibits any person from claiming and receiving from the board of supervisors of a county any fee or compensation not authorized by law, and prohibits the board of supervisors from knowingly voting for the payment of any such claim unauthorized by law, making it clear beyond dispute that the objects of the two statutes are entirely separate and distinct, the one, the Act of 1871, prohibiting the appropriation of money by the board of supervisors to any object not authorized by law, and the other the Act of 1906, that is, section 344, prohibiting the claiming receiving or paying of an unauthorized claim, that is, such a claim as is not really just, due and owing, or which might properly be claimed and voted for and paid if just, due and owing.

The word, "appropriate" means more than mere payment; it means in the first instance to set apart for, to provide for, to create for, to make provisions for; for ample, such an act as by ordinance of the board, taking money from a fund provided for one

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special object or appropriation and applying it to some other object and appropriation, although both objects and appropriations might be within the jurisdiction of the board of supervisors, thus, such as by ordinance taking money from the jail or court house fund and appropriating it to a bridge or public highway fund.

This argument is borne out by the fact that there appears in the Code of 1906, section 346, which is in substance the same as section 1386 of the Code of 1871, by which the decision of the court in the Baum case was controlled, creating a civil liability of the board for the misappropriation of funds, such as hereinbefore illustrated.

The distinction between the two statutes, we think must be clear, and when the distinction is drawn, it becomes very apparent that the decision of the court in the Baum case is no authority in the case at bar.

The language of the indictment follows the language of the statute itself, and is sufficient. The statute, itself, declares in what the fraud and corruption aimed at and prohibited by it, shall consist, viz: the knowingly voting for the allowance of an unauthorized claim, meaning simply this, that it is a violation of the law for a member of the board of supervisors to vote for the allowance of a claim to be paid out of the public trust funds, knowing at the time that the claim it not due, is not just and is not owed dollar for dollar. To demonstrate that this is true and is exactly and precisely what the statute means and what the legislature intended it to mean, we call the court's attention to the following sections, all of which necessarily will be considered together.

First, we call the court's attention to section 311 of the Mississippi Code of 1906 and section 3684 of Vol. 11. Hemingway's annotated Mississippi Code 1917, which says: "A person having a just claim against any county shall first present the same to the board of

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supervisors thereof for allowance; and, if the board shall refuse to allow it, may appeal from the judgment of the board to the circuit court or may bring suit against the county; and, either case if such person recover judgment, the board of supervisors shall allow the same, and a warrant shall be issued therfor."

Next, we call the court's attention to section 341 of the Mississippi Code 1906 and section 3714, Vol. 11, Hemingway's Annottated Mississippi Code 1917, which reads as follows: "All demands and accounts against the county shall be audited and allowed or rejected, on due proof, in term time; and any demand or account allowed by the board, in whole or in part shall be filed and preserved by the clerk, and numbered to correspond with the warrant to be issued therefor, and the order allowing such claim shall be entered on the minutes, specifying the name of the claimant, the amount allowed, the page and particular section of the law under which such allowance is made, and on what account and the clerk shall issue a warrant on the county treasurer, under the seal of his office in favor of the claimant."

Next we call the court's attention to section 343, Mississippi Code 1906, and section 3716 of Hemingway's Annotated Mississippi Code 1917, Vol. 11, which reads as follows: "It shall be unlawful for the board of supervisors to allow a greater sum for any account, claim, or demand against the county than the amount actually due thereon, dollar for dollar, according to the legal or ordinray cash compensation for such services rendered or for salaries or fees of officers, or materials furnished, or to issue county warrants or orders upon such accounts, claims or demands, when allowed for more than the actual amount so allowed, dollar for dollar; and any illegal allowance by such board may be inquired into by the proper tribunal,

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upon legal proceedings for that purpose whenever such matter may come into question in any case."

Then follows section 344 of the Mississippi Code 1906 and section 3717, Vol. 11, Hemingway's Annotated Mississippi Code 1917, which renders criminal the doing of the things prohibited in the previous sections, that is, section 343 of the Mississippi Code of 1906 and section 3716 of the Hemingway's Annotated Mississippi Code 1917, Vol. 11, and a consideration of these two sections together render clear the meaning of the words "not authorized by law" as used in section 344 of the Mississsippi Code of 1906, and section 3717, Hemingway'sAnnotated Mississippi Code 1917, under which the appellant is prosecuted, and these words mean exactly and precisely what the language of section 343 of the Code of Mississippi 1906 and section 3716, Hemingway's Annotated Mississippi Code 1917, Vol. 11, says: "It shall be unlawful for the board of supervisors to allow a greated sum for any account, claim, or demand against the county than the amount actually due thereon, dollar for dollar, according to the legal or ordinary amount of compensation for such services rendered of for salaries or fees of officers, or materials furnished or to issue county warrants or orders upon such accounts, claims or demands, when allowed for more than the actual amount so allowed, dollar for dollar."

Now, what is the complaint against the appellant in this case? It is that he knowingly voted for the allowance and payment of a claim which was not due, dollar for dollar, under the terms and conditions of the contract upon which the services claimed for had been rendered, or rather were to be rendered, because the proof in the case shows that the services, as a matter of fact, had not been rendered, the admission of the appellant, himself, is that he knew at the time that the work had not been done according to the contract.

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Therefore he knew that the claim was not due dollar for dollar, and knowing this, voted for its allowance and payment and this is the case of the state against him.

SYKES, J., delivered the opinion of the court.

The appellant was indicted for knowingly voting for the payment of an alleged unauthorized claim while a member of the board of supervisors of Tippah county under section 344, Code of 1906, section 3717, Hemingway's Code. The indictment practically follows the language of this section of the Code. At the conclusion of the introduction of the testimony for the state, the defendant made a motion to exclude same and for the court to instruct the jury to find the defendant not guilty because the indictment charged no offense and the proof in the case did not show that the defendant was guilty of any offense. This motion was overruled, and the defendant excepted to the action of the court. At the conclusion of the testimony introduced by the defendant this motion was again renewed and overruled by the court. The jury found the defendant guilty, and he was sentenced to pay a fine by the court from which judgment this appeal is prosecuted.

It is strenously insisted upon this appeal that the indictment charges no offense that the use of the word "knowingly" in the indictment is not sufficient, but that the indictment should have also charged that the defendant fraudulently and corruptly voted for the payment of the alleged unauthorized claim.

It is unnecessary for us to decide as to the sufficiency of the indictment because the case must be reversed upon the facts. The gist of the testimony for the state is to the effect that the claim was unauthorized because the road contractor, in whose favor the claim was made, had not worked the roads in accordance with the

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plans and specifications when this payment of thirty-three and one-third per cent. of the contract price was voted for by the defendant, who as a member of the board of supervisors from this supervisor's district was also in charge of the working of the public roads in his district. The defendant before this claim was made had inspected the roads and made out the claim for the contractor, filed it, and had it allowed by the board. In the plans and specifications under which this road contract was let it is provided that: "All roads are to be the width specified in specifications unless in the judgment of the supervisor it would be impractical in some places. A—1 roads are to be twenty-two feet in width, with eighteen-inch crown, unless considered impracticable by the supervisor."

Without narrating in detail the testimony of the state suffice it to say that several witnesses testified that at the time his claim was voted and paid the road had not been worked by the contractor in accordance with the plans and specifications; that in some places it was too narrow; that the ditches were not properly cleaned out and the bridges had not all been repaired; that the road was rough and there were some holes in it. On the plans and specifications under which the roads here in question were let to the contractor was the proviso that the roads were to be fourteen and sixteen feet in width, unless considered impractiable by the supervisor. The uncontradicted testimony in the case shows that, before this claim was allowed by the board the contractor had about five days on it; that this was during very dry weather, and it was very hard to work the road at that time. The defendant testified that before the claim was allowed, as it was his duty to do, he inspected this road, and that he approved the work done by the contractor. He was then asked this question:

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"Did you in your judgment think that it was good enough to warrant you to issue that warrant? A. Yes, sir; I knew that the road was not according to the contract and he must come back as soon as the ground got in order to make it wider.

"Q. How many places was that road narrow? A. I don't recollect. The ground was so hard that he could not work it. He came back in May and made it wider.

"Q. With reference to the bridges and the holes in the road? A. Bedding the road up it made it dry and hard and made the bumps, and I told him to wait until it rained and then grade it. I told him it was going to be rough till the clods were broken up and it had been traveled on. That is why the road was rough because it was very hard and dry. Last March it did not rain any, and the road was dry and hard. The place where they spoke of there it was impracticable to make it wide enough, and it was so hard that it was killing his mules to do that. It was made wider after that."

There was no testimony whatever introduced from which the jury would have been justified in believing that the defendant in voting for the claim did so fraudulently or corruptly or through any bad faith. The testimony, taken most strongly for the state, only shows that the defendant in knowingly voting for this claim either did so through error or mistake of judgment. There is no testimony to show that the defendant in voting for the claim acted dishonestly. In fact, the testimony shows that he believed the board of supervisors had the power to pay this claim at that time. He was acting judicially.

In the case of *Paxton* v. *Baum*, 59 Miss. 531, in the opinion in chief on page 537 this court said:

"But, in view of the well-settled rule of the common law that for errors or mistakes a public officer acting judicially or quasi judicially is not liable, it could not

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have been the purpose of the legislature to make members of boards of supervisors personally liable for errors or mistakes as to how to act in matters committed to such boards by law, and as to objects for which an appropriation of money is authorized to be made by them."

Again on page 539 in the opinion in response to the suggestion of error it is stated:

"Judicial officers of all grades are liable for their corrupt judgments. . . . But we cannot ignore the fact that supervisors, in the discharge of many of their functions, are judicial officers, and especially so in adjudicating upon the validity of claims against the county. A law which would make them personally liable for every erroneous judgment rendered, if constitutional, would certainly have the effect of preventing any solvent man from accepting the office, or of becoming the surety of those who did."

And more especially is this true if they are criminally liable for mistakes or errors of judgment in matters within their jurisdiction. This opinion concludes as follows:

"Manifestly, it is impossible, after we pass the point of corruption, to draw any line other than that laid down by us, namely, liability where the subject-matter of the appropriation is beyond the jurisdiction of the board; nonliability where the object is within the jurisdiction, but there has been a mistaken exercise of legal power. Within this limit, every case must depend upon its own facts."

In the case of *State* v. *Green*, 111 Miss. 32, 71 So. 171, Green as county superintendent of education and the surety on his bond were sued in the chancery court for failure of this officer to perform certain duties of his office. A demurrer was sustained and the bill dismissed. In affirming the decree of the lower court, on page 35

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of 111 Miss., on page 172 of 71 So., in the opinion it is stated:

"But for errors of judgment and discretion, in the absence of fraud, he is not liable on his official bond or otherwise."

The opinion concludes as follows: "In view of the fact, therefore, that the work paid for by the superintendent and the several alleged irregularities were within the jurisdiction of his office and no corruption is charged, the bill fails to state a cause of action."

The working of the public roads is peculiarly within the jurisdiction of the board of supervisors, and in voting for the payment of this claim the defendant could only be criminally liable for fraudulently or corruptly voting for an unauthorized claim. The proof in this case fails to show that his conduct was either fraudulent or corrupt. The court erred in not instructing the jury to find the defendant not guilty.

The judgment of the lower court is reversed, and the defendant discharged.

Reversed, and defendant discharged.

KEMP *v.* STATE.

[83 South. 744, In Banc. No. 21045.]

INDICTMENT AND INFORMATION. *Error to permit amendment of indictment.*

It was error for the court to permit the state to amend an indictment framed under Code 1906, section 1029 (Hemingway's Code, section 754) charging that defendants did unlawfully cohabit together in adultery, by striking therefrom the words "in adultery" the charge of cohabitation "in adultery" being a matter of substance in the indictment.

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APPEAL from the circuit court of Humphreys county. HON. H. H. ELMORE, Judge.

Mollie Wemp was convicted of unlawful cohabitation with a male and appeals.

The facts are fully stated in the opinion of the court.

Mortimer & Sykes, for appellant.

Replying to the brief of the attorney-general, the decision of this case involves a construction of the Code of 1906, section 1508, being section 1266 of Hemingway's Code.

We wish to say at the outset that this statute is in derogation of the common law and should be strictly construed. In speaking of such statutes the court in the case of *Clarke* v. *State,* 100 Miss. 754, second paragraph, uses the following language. "The standing aside from the beaten path of immemorial usage worn hard and bare by the footsteps of our forefathers in the law, in order to make way for the passing of the funeral cortege, brought by a too liberal construction of the criminal statute enacted in derogation of the common law is the recognition and enforcement of a dangerous doctrine to comport with the humane and beneficent conduct of the civilized court."

This specific section sets out six instances in which when there shall appear to be a variance between the statement in the indictment and the evidence offered in proof, an amendment may be allowed. They are: First. In the name of any county, city, town, village, division or any other place mentioned in such indictment. Second. In the name or description of any person or body politic or corporate, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein. Third. In the name or description of any person, body politic, or corporate, therein stated or al-

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leged to be injured or damaged, or intended to be injured, or damaged by the commission of such offense. Fourth. In the christian name or surname or both, or every description whatever or any person whomsoever therein named or described. Fifth. In the ownership of any property named or described therein. Sixth. In the description of any property or things.

Taking up the cases cited by the attorney-general in the order in which he cites them, in *McGuire* v. *State,* 91 Miss. 414, the amendment therein made is expressly authorized by section 1508 sub-division five above set out, viz: In the ownership of any property named or described therein.

Coming next to *Thurmond* v. *State,* 94 Miss. 1, the amendment therein is specially authorized by this section and in our sub-division number three, viz: "In the name or description of any person . . . therein stated or alleged to be injured or damaged, etc.

In *Winston* v. *State,* 101 Miss. 101, cited by counsel, this amendment is specifically authorized by section 1508, our subdivision number one, viz: "In the name if any county, city, town, village, division, or any other place mentioned, etc."

In *Smith* v. *State,* 60 So. 330, cited by counsel, the amendment is expressly authorized by our sub-division number four, of this section viz: "In the christian name or surname, or both, etc." *Clark* v. *State,* 100 Miss. 751, has no application to the case at bar because while the state had the right to amend the indictment under section 1508, they did not amend it, and the case was properly reversed.

At the top of page six of his brief the attorney-general wisely and correctly observed that "None of these amendments would have been permissible under the common law." Which is an admission on his part that this statute is in derogation of the common law,

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and those amendments are allowable only and solely which are found therein.

Counsel also observed in his brief that our contention lies upon the old authorities, common-law rules. In this he is also eminently correct, and it is our contention also that so far as this case is concerned the common-law rules are still in force and effect. He even makes the statement "that this court would not now hold that a man charged with stealing a black horse could escape punishment because proof showed color of horse which he stole to have been red.". He also makes the further statement that this court would not now reverse the case because the name of a person indicted for murder which the proof actually showed he committed was stated in the indictment as that of Mitchell J. McGuire and proof showed his name was Michael J. McGuire. In both instances he is incorrect, and to prove that contention we cite his own authority that of *Clarke* v. *State.*

In 100 Miss. 751, wherein the defendant was indicted for killing one man and the proof showed he killed another, and after being convicted on appeal, the case was reversed for the reason that the indictment was not amended. In the Clark case, as already above observed, the indictment could have been amended, because of section 1508, but had it not been for that section it could not have been amended, because that section specifically provides for such an amendment.

What counsel overlooked is the fact that there is absolutely nothing in section 1508 which permits an amendment such as was made in the case at bar. The case at bar falls within the following class of cases. *Bloomenberg* v. *State,* 55 Miss. 529; *Tyler* v. *State,* 69 Miss. 395, 11 So. 25; *Hudson* v. *Stote,* 73 Miss. 784, 19 So. 965.

In all three of these cases, defendants were charged with unlawful sale of intoxicating liquors, and it was

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specifically stated in the indictment to whom the sales were made. In the Hudson case, the affidavit was amended by striking out the names of the persons to whom the sales were made on account of the inability on the part of the state to prove that the sales were made to the parties to whom it was charged they were made.

In the Hudson case, Judge WOOD uses this language: "Any sale of liquor unlawfully to any man is an offense, and may be charged in general terms, but when a sale to a particular person is charged, the name of the buyer, as we have seen, becomes descriptive of the identity of that which is legally essential to the charge, and no amendment in such case is permissible which charges another and distinct offense. He also uses this language: "It is true that no averment of the names of the buyers in the affidavit was originally necessary, yet by making that unnecessary averment, it becomes essential as descriptive of the offense charged, citing *Tyler* v. *State,* 69 Miss. 395.

As stated in our original brief, it was unnecessary to charge the manner of cohabiting in the indictment, but the state saw fit to charge that it was cohabiting "in adultery" and "in making that unnecessary averment it became essential as descriptive of the offense charged."

In conclusion we respectfully submit that an examination of section 1508 of the Code of 1906, being section 1266 of Hemingway's Code, will disclose no authority whatever for an amendment such as was made in the instant case, and that in permitting such an amendment the trial court committed, an error so grave that the cause should be reversed and remanded.

N. T. Currie, attorney-general, for the state.

The appellant was not prejudiced by the amendment. If error, it was a harmless error. *Tynes* v. *State,* 93

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Miss. 119, 46 So. 538. The amendment in this case was permissible under section 1266 of Hemingway's Annotated Mississippi Code of 1917. When the amendment was allowed, the appellant had the right, if she deemed herself prejudiced thereby, to move the court to withdraw the case from the jury and continue it or postpone it until a later day. No such request was made by the appellant and the trial proceeded with her consent with the amendment to clear a variance between the allegation in the indictment and the proof in the case. Counsel for the appellant make their contention lie upon very old authorities, common law rules. This court would not now hold that a man charged with stealing a black horse could escape punishment because the proof showed the color of the horse which he actually stole to be red. This court would not reverse a case now because the name of a person indicted for a murder which the proof showed he actually committed was stated in the indictment as that of Mitchell J. McGuire and the proof showed his name was Michael J. McGuire.

All such trivial matters are now held not to be a matter of substance. Counsel for the appellant in their brief admitted that it was unnecessary to charge the unlawful cohabitation as "in adultery or in fornication," thus admitting that an indictment drawn under this statute charging unlawful cohabitation charges the offense created and punished by the statute. If this is true as a matter of law and reason, it goes without saying that the words "in adultery or in fornification" are mere surplusage in the statute and indictment and are not necessarily descriptive of the offense because in either case there is but one offense, that of unlawful cohabitation.

Under this indictment, the only material matter for the state to prove was the unlawful cohabitation together of J. W. Morrison and Mollie Kemp, the appellant, and

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this the state accomplished to the satisfaction of the jury. That is all the statute required the state to prove. We do not care to be drawn into a lengthy discussion of the old, unreasonable, highly technical and obsolete rules of the common law. We prefer to deal with the question in the light of more modern statutes and decisions. In the case of *McGuire* v. *State,* 91 Miss. 414, 44 So. 802, this court held where an indictment for forgery based upon the following order: "Mr. ——, Express Agent; Please let this boy have my jug. Willie Foster," and afterwards, by permission of the court the name Willie Foster was stricken out and the express company substituted for and the amendment was allowed, since the identity of the offense was in no wise changed. In the case of *Thurmond* v. *State,* 94 Miss. 1, 74 So. 434, which holds, under Code 1906, paragraph 1508, an indictment charging accused with the murder of one man, and a conviction under the same indictment for the murder of another man. An amendment to the indictment was made so as to describe decedent as "Convict 12," the evidence showing that "Convict 12" was the name decedent was known by and the witness being unable to say whether decedent's name was Will Johnson.

In the case of *Winston* v. *State,* 101 Miss. 101, 57, So. 545, this court held under Code 1906, paragraph 1508, an amendment to an indictment for assault and battery by the insertion of the words "and district" between the words "in the county" and "aforesaid," making it read: "In the county and district aforesaid."

In the case of *Smith* v. *State,* 30 Miss. 356, 60 So. 330, this court held under the expressed provisions of Code 1906, paragraph 1508, that the court may allow an amendment to an indictment so as to give the correct christian name of the accused. None of these amendments would have been permissible under the common law and under the rule contended for by counsel for

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appellant, however, we find them all held allowable under our statutes and practice.

In the case of *White* v. *State,* 95 Miss. 75, 48 So. 611, it was held by this court where an affidavit for maliciously shooting a horse which neither set out the name of the horse nor its description, laid the ownership of the horse in one person, it was error to amend the affidavit by laying the ownership in another. That is true for the reason that there was absolutely nothing in the indictment from which the horse could be identified.

In the case at bar the accused were named J. W. Morrison and Mollie Kemp, the place of their residence is set out; the fact of their unlawful cohabitation is set out; both they and their offense clearly identified and specifically described without the words "in adultery," which was stricken from the indictment.

In the case of *Clarke* v. *State,* 100 Miss. 751, 57 So. 209, this court held where an indictment for murder charged the killing of the person named and the evidence showed the killing of another person and the state did not seek to change the indictment the conviction could not be sustained on the theory that the trial court could have amended the indictment as authorized by Code 1906, paragraph 1508. The reason is that in such a situation the accused could not plead former jeopardy in a subsequent trial; that is *autrefois convict* or *autrefois acquit.* The decision, therefore, would have been otherwise had the state, as it had the right to do, amended the proof so as to make it correspond with the allegation in the indictment. Counsel for appellant contends that the words "in adultery" could not be stricken from the indictment by amendment for the reason that they are descriptive of the persons indicted, the words "in adultery" importing into the indictment the allegation that the persons indicted were not single but married, but not to each other.

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Under the old common-law rule contended for by appellant's counsel the point is good, but by an examination into the authorities, that is, statutes and text books, we find in 1 Russell on Crimes, page 54, that the fourteenth and fifteenth Vict. ch. 100, reciting that offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and variances between the proof and the indictment expressly provides that the very amendment which the court allowed in the case at bar might be made, for in those acts it is provided, among, other things, that an indictment may be amended, "in the name or description of any person or persons . . . or in the christian name or surname or both christian and surname," and then follows, this sweeping provision: "or for other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described."

1 Russell on Crimes, pages 54 and 55. Sections 1266 and 1267 of Hemingway's Annotated Mississippi Code 1917, are reprints substantially of the Acts of Vict. ch. 100, fourteenth and fifteenth, above quoted from. We invite the court to compare the two statutes with said Acts 14 and 15.

Unlawful cohabitation is a mere misdemeanor and the intervention of a new grand jury and a new indictment was not at all necessary to effect the amendment made in the indictment in this case.

We submit finally upon this point that the test now is whether, under a subsequent prosecution for the same offense, the appellant could, upon the record in this case as it now stands, successfully plead *autrefois convict.*

The gist of the offense is unlawful cohabitation, and the statute really has no regard so far as a matter of

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substance is concerned whether that unlawful cohabitation be between married or single persons because in either case the offense and the punishment are all the same.

We submit that the amendment was properly allowed, the peremptory instruction properly refused, and the guilt of the appellant conclusively established and that the case ought to be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellant, Mollie Kemp, was jointly indicted and convicted with one Morrison on a charge of unlawful cohabitation, from which she appeals; the charging part of the indictment being as follows:

"That J. W. Morrison and Mollie Kemp, in said county, on the 1st day of May, 1916, and continually until the date of filing of this indictment, the said J. W. Morrison a man, and Mollie Kemp, a woman, they not being then and there lawfully married each to the other, did lewdly and unlawfully cohabit together in adultery."

On the trial of the case the state failed to prove that either party was married; that is, that the parties had cohabited "in adultery" as charged. When counsel for appellant moved the court for a peremptory instruction and discharge of the appellant for the reason that the state had failed to prove the adultery as alleged in the indictment the court permitted the district attorney, on motion, to amend the indictment by striking out the words "in adultery." Thereupon the case went to the jury, resulting in a conviction, and this action of the court is assigned here as reversible error.

The indictment was drawn under section 1029, Code of 1906 (section 754, Hemingway's Code), which provides that, "if any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall

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be fined," etc. The latter part of this section also provides, "but it may be proved by circumstances which show habitual sexual intercourse."

We think that the charge of cohabitation "in adultery" was a matter of substance in the indictment, and should have been proved by the state, since the grand jury had charged that the unlawful cohabitation was a cohabitation by the parties "in adultery." Therefore the court erred in permitting the amendment of the indictment with reference to a substantial part of the crime as charged by the grand jury. Whether or not it was necessary in the first instance to charge that the unlawful cohabitation was either in adultery or fornication, since it did not charge habitual sexual intercourse between the parties as the statute prescribes the state could do, we do not decide. But, having specifically charged the cohabitation "in adultery," it should have been so proved by the state.

The judgment of the lower court is reversed and the case remanded.

Reversed and remanded.

Liverpool, London & Globe Ins. Co. et al. v. Kosciusko & S. E. R. Co. et al.

[83 South. 745, In Banc. No. 20874.]

On suggestion of error in former opinion. Suggestion of error as to one of the defendants was sustained and overruled as to another.

For former opinion see 83 So. 305, 121 Miss.

Appeal from the circuit court of Attala county.

Hon. T. L. Lamb, Judge.

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D. H. Glass and *J. G. Smythe*, for appellant.

Green & Green and *S. L. Dodd*, for appellee.

Cook, J., delivered the opinion of the court.

When this case was reversed generally the attention of the court was not directed to the fact that there was no evidence tending to show that the Bolinger Franklin Lumber Company had any interest in or control over the "antiquated locomotive" charged with setting fire to the building and its contents.

The suggestion of error, among other things, submits that the trial court was manifestly right in directing a verdict for the lumber company.

We are satisfied that we were in error in so far as the judgment of the court directing a verdict for the lumber company is concerned. So this suggestion of error is sustained, and the judgment of the lower court is affirmed.

We have carefully re-examined the record, and adhere to our former opinion touching the liability of the railroad company. This was a question of fact, and should be submitted to the jury.

It follows that the suggestion of error of the railroad company will be overruled.

Overruled.

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LANDER v. TOLBERT.

[83 South. 748, In Banc. No. 21010.]

1. EVIDENCE. *Court judicially knows that there is a principal for each school but only one superintendent in district.*

It is a matter of common knowledge that in a number of separate municipal school districts composed of the larger cities and towns of the state, there are a number of separate schools and that in each one of these schools there is a principal, while for all of the schools there is one superintendent.

2. SCHOOLS AND SCHOOL DISTRICTS. *Trustees of separate school district have management of superintendent elected by them.*

Under Code 1906, section 4525 (Hemingway's Code, section 7345), the trustees of separate school districts have absolute control and management of the superintendent elected by them and have the right to prescribe his duties, fix his term of office and the amount of his salary and in what manner it shall be paid.

3. SCHOOLS AND SCHOOL DISTRICTS. *Compensation of superintendent and other employees of district not dependent on license.*

Under Code 1906, section 4525 (Hemingway's Code, section 7345) and Laws 1916, chapter 186 (Hemingway's Code, section 7348), the only employees of a separate school district that are in any wise brought under control or supervision of the county superintendent of education are teachers and principals, and hence the superintendent of a separate school district, librarian, janitor or other employee, need not hold a teacher's license, and they do not need any order from the county superintendent in order to be entitled to their compensation.

4. MANDAMUS. *Proper remedy to compel clerk of separate school district to issue warrant to pay compensation to superintendent.*

A municipal clerk is a mere ministerial officer, whose duty it is to obey an order of the trustees of a separate school district to issue a warrant in payment for service of a superintendent of the school district, and having failed to do so, the superintendent may compel his obedience to the order of the trustees by mandamus.

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APPEAL from the circuit court of Hancock county.

HON. J. H. NEVILLE, Judge.

Petition for mandamus by C. R. Tolbert to compel Sylvan J. Lander to draw and deliver to the petitioner a warrant. From a judgment for petitioner, defendant appeals.

The facts are fully stated in the opinion of the court.

Robert L. Genin, for appellant.

The assignment of errors and the grounds set out in the demurrer are practically the same. Will therefore argue the assignments of error numerically as therein set out:

First, "because there is a plain, adequate and speedy remedy in the ordinary course of law." Section 2533 of the Hemingway Code, section 3231, Code 1906, provides that mandamus shall be issued only in the event there is not a plain, adequate and speedy remedy in the ordinary course of law.

The appellee in this case could have resorted to two plain, adequate and speedy remedies in the ordinary course of law. First, if his claim was valid and if he rendered services he could have recovered under his alleged contract in the circuit court for the two months' salary, and second, there is a plain specific remedy provided for by statute, section 7580 of the Hemingway Code which provides: "In all controversies arising under the law, the opinion and advice of the county superintendent shall first be sought, from whose decision an appeal may be taken to the state board of education upon a written statement of the facts certified by the county superintendent or by the secretary of the trustees."

If the statute permitting mandamus is to mean what it says, either of the two remedies above referred to,

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should have been sought before resorting to the extraordinary remedy of mandamus.

In *McHenry* v. *State,* 91 Miss. 562, 44 So. 831, the court said: "Mandamus is an extraordinary remedy and should not be resorted to if the purpose sought to be accomplished by it can otherwise reasonably be accomplished."

If the City of Bay St. Louis was indebted to the appellee, he should have taken that course open to him through the circuit court in an action at law in debt or contract, or he should have appealed to the superintendent of education and from him to the state board of education for the issuance of a pay certificate upon which he would have been entitled to the writ because that certificate would have been tantamount to a judgment of the circuit court. If the board of mayor and aldermen had allowed the claim or if the county superintendent of education had issued a pay certificate, or if a judgment of the court for the amount had been procured, then application for the writ of mandamus would have been appropriate, because it is a mandatory ministerial official duty of the city clerk or secretary to issue the warrant.

But the appellee has two other plain adequate and speedy remedies as above enumerated and his petition for mandamus should have been dismissed. Second, assignment of error: "Because it is not alleged or shown that the plaintiff or appellee presented or procured a pay certificate from the county superintendent of education."

Under our school system, the superintendent of education is elected by the entire people of the county including the municipalities and he has supervision of all the schools of the county. In duties of county superintendent as provided by section 4497, Code 1906, section 7574, Hemingway's Code, paragraph "b" provides for method of issuing pay certificate; paragraph "k"

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to carefully preserve all reports of school officers and teachers; paragraph "l" to make annual report to mayor and board of aldermen of name, sex and color of teachers, number of months taught by each and the aggregate amount of pay certificates issued to each and all.

Under section 401, Code 1906, section 7578, Hemingway's Code, the city has a certain *pro rata* share of the salary of the county superintendent to pay and he has the supervision of the schools of the separate school districts of the city in the same manner as the schools of the county excepting as to appointing of trustees and contracting with teachers but has supervision and a check over the entire school system and its teachers.

In every section of our school laws pertaining to payment of salaries, the court will notice that the county superintendent must be satisfied that the duties of each individual, whether as teacher, principal or superintendent has been faithfully performed according to law, and when as in section 7574 paragraph "k" above referred to "officers and teachers" are provided, it evidently means the superintendent of city schools.

Code 1906, section 4563, Hemingway's Code, section 7379, provides that the county superintendent shall not issue a pay certificate for the last month taught until the teachers shall have delivered to him the school register in good order and properly filled out at the end of each month, the teacher shall file a report with the county superintendent before a pay certificate is issued.

The appellee does not contend that his duties do not require him to teach and as a matter of fact he does teach and his title as superintendent gives him that distinction of supervising other branch schools in addition to his duties as teacher. The appellee may contend as he did in the lower court that his title as superintendent of city schools gives him that distinction and removes him from those duties enumerated by statute to

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teachers and principals, but whether supervising teachers or teacher he is a teacher just the same under our law and is required to have a license to teach and comply with all laws with reference to teachers as hereinafter more fully explained.

To further show that the schools of the city as a separate school district are under the supervision of the county superintendent and not divorced from the state and county system and these provisions as to teacher applies to the appellee, in section 4525, Code 1906, section 7345, Hemingway's Code, paragraph "K" —"but they (trustees of separate schools districts) cannot contract with the principal or teacher who does not hold a license from the county superintendent.

Paragraph "l" of the same section provides: "The secretary of the trustees, shall, within ten days after the close of the term, transmit their report to the county superintendent, and it shall be unlawful for the superintendent to issue pay certificates for the last month's attendance of county pupils until said report is filed with him."

Also in chapter 186, Laws 1916, section 7348, Hemingway's Code, provides; ". . . and they (trustees of the separate school district) are hereby authorized to write orders to the clerk of the municipality or to the county superintendent to issue warrants or pay certificates on any available school funds of such school districts." Those orders authorized to be directed to the trustee's jurisdiction under the statutes, such as fuel, repair, care, protection and furnishing of the school and those orders authorized to be directed to the county superintendent for pay certificates are for those things under the jurisdiction of the county superintendent such as salaries for all employed under license from the state issued through him and under supervision of the county superintendent as the appellee in this case.

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Section 7382, Hemingway's Code, plainly sets out how warrants are issued by the secretary of the city and this honorable court will plainly perceive from that section that the county superintendent must issue a pay certificate for all employed under a teacher's license whether they enjoy the title of superintending teacher or plain teacher.

In section 4565, Code of 1906, Hemingway's Code, section 7381, provides a penalty for failure to make last monthly report by the teacher to the superintendent of education of the county, the penalty being a deduction of twenty per cent of the salary. Could the lawmakers have intended that the teacher called the city superintendent be immune or exempt from reporting and the penalty for failure in so doing.

Again in section 4623, Code 1906, Hemingway's Code, section 7406, provides: "Every teacher in a public school must, before taking charge of a school and one week before closing a term, notify the county superintendent of the fact, naming the day of opening or closing." Every teacher in a public school before taking charge of a school means also the superintendent teacher and the appellee herein; after careful construction of these statutes together, there can be no escape that the appellee is responsible to the superintendent of education of the county and subject to all penalties for failure to carry out the laws for the supervision and control of schools and get his pay certificate from his supervising officer and county superintendent certifying that the appellee is entitled to receive his salary according to contract made by the trustees within the school term out of the school fund which the county superintendent is accountable to the board of mayor and alderman and ultimately to the tax payers and citizens who elect him county superintendent.

It is therefore absolutely necessary under our system for the appellee to get a certificate from the county

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superintendent certifying the amount due the appellee and from what funds it should be paid and all other things required by section 4497, Code 1906, section 7574, Hemingway's Code, paragraph 'B.'

Fourth, assignment of error: "Because the appellant is without authority in law to issue warrants to the petitioner (appellee) without the presentation of a pay certificate from the superintendent of education or an order from the board of mayor and alderman."

Section 7382, Hemingway's Code, section 4566, Code 1906, provides: "Upon the presentation of a pay certificate for services rendered as a teacher, duly attested by the superintendent, the clerk of the board of supervisors or the municipality being a separate school district shall issue a warrant on the treasurer for the amount stated in the certificate, the warrant to state upon its face the number of the month, the term during which the services were rendered, as first month, second month, etc., the clerk shall keep a file of the certificates as a part of the official record at his office."

We contend, that under our system pay certificates is the only authority upon which the secretary or the clerk of the city can issue a warrant upon the city funds in this case. The clerk of the city is a ministerial officer and can only issue warrants where all matters necessary to the allowance and payment of claims have been performed and approved. He has no power of discretion and cannot issue warrants on any funds he wishes or thinks advisable, but this must be first designated and directed by a superior officer. The orders directed to the clerk of the city by the trustees to issue a warrant on the city funds did not contain any information as to which of the several school funds those warrants should be drawn as is necessary under section 7348, Hemingway's Code, and this could not be supplied by the clerk, nor did this order state for what month of the school term these amounts covered.

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Section 7328, Hemingway's Code, is mandatory and therein the city clerk is without authority to issue a warrant without first having a pay certificate from the superintendent of education. If the appellee has a right to the writ of mandamus he has sued the wrong official and should have applied for it against the county superintendent of education to issue the appellee a pay certificate.

Fifth assignment of error: "Because the contract is void between the trustees and the appellee, being a contract for the payment of a monthly salary for months not in the school term, the schools being closed."

Section 4526, Code 1906, section 7345, Hemingway's Code, paragraph "J" gives the trustees the power to elect a superintendent and principal and prescribes their duties and powers, but nowhere do we find power conferred upon the trustees to fix their salaries beyond the months the school is taught. The superintendent, principal and other teachers by no stretch of the imagination can have any duties when the schools are closed during the summer months of June and July and the two months the appellee claims salary his petition fails to show duties performed, being satisfied with the use of the expression "Services rendered." What those services were, does not appear, nor were they apparently explained sufficiently to the county superintendent of education for him to issue a pay certificate.

Paragraph "J" of section above referred to, nor any other paragraph or section of the laws of our state, authorize the trustees of the separate school district to contract or employ a superintendent of the city school and relieve him from any of the duties for which all the teachers are accountable to the officers of the county and state.

Paragraph "J" means only that the trustees have the power to elect one of the teachers as superintendent who shall be the superintendent or head teacher of all

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the city schools and a principal for such school who shall be the head teacher of that school for which he is elected and prescribe their powers and duties in and about the school, but this honorable court will in no section of our school law find that the superintendent and principal teachers are entitled to their warrant on any funds of the city unless they do something set out for them to do by statute and that is teach or supervise those that do teach and procure their pay through a certificate issued by the proper official which is the county superintendent of schools who issued him his license to teach.

Under the school laws and the common understanding of mankind, the appellee is as much a teacher as under military law a lieutenant, a captain, or a major in the army are all soldiers; and under our state laws the chief justice of the supreme court is a judge and the speaker of the House of Representatives is a legislator and where there are no special provisions for payment of salary at different times than the others he or they are controlled by the same rules, regulations and conditions precedent before he can be paid.

We do not suppose that appellee will contend that he is not a teacher and exempt from the procurement of a license as provided by paragraph "K," section 4525, Code 1906, section 7345, Hemingway's Code.

The statute authorizing the trustees to elect a superintendent and principal carries all the requirements and duties of those in charge of a school or schools with reference to reports, license qualifications and pay provided for by general law controlling our public schools and creates no special privilege or immunities from our general well-planned universal system and a contract for pay outside of a school term is void.

In conclusion we submit to this honorable court, that if the judgment of the lower court is permitted to stand, out of which school fund will the appellant issue those

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warrants as payable? Will not the principal of the schools also be entitled to their pay in the summer months when the schools are closed if the trustees choose to so fix their salaries just the same as the superintendent?

And would not the trustees have the same power to issue an order to the clerk of the city to issue warrants for all other teachers' salaries during the summer closed season of schools?

All contracts by the trustees of the separate school districts are contracts for services and if this case is affirmed and the appellant forced to issue warrants on the city treasury the trustees will of course be prevailed upon not to make flesh of one and fish of the others and as a consequence they will issue all orders to the city clerk to issue warrants for all salaries and none of the teachers will be responsible to the superintendent of education of the county thereby creating a very unsatisfactory chaotic condition instead of a universal system in our public schools.

Section 7320, Hemingway's Code, section 4485, of the Code of 1906, provides: "There shall be maintained a uniform system of free public school for all children between the ages of five and twenty-one years."

We therefore submit to this honorable court that a reversal of this case is necessary to keep within supervision of the country superintendent of education and other state officers, all teachers, whether superintendent of city schools, principals or interior teachers and maintain that uniform system built up by many years of experience and study of the educators and lawmakers of our state.

McDonald & Marshall, for appellee.

Mandamus was resorted to by the petitioner under the provisions of section 3231 of the Code of Mississippi of 1906, section 2533 of Hemingway's Code.

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Appellant urges here that the remedy was improperly resorted to, because there are, as he contends, two plain, adequate, and speedy remedies in the ordinary course of law; (a) since the "controversy," in a remote sense, arose under the school laws, the petioner should have appealed to the county superintendent of education, and from him, in the event his decision proved adverse, upon a certified written statement of facts (section 4503, Code of 1906, section 7580, Hemingway's Code), to the state board of education, whose decision would be final; and (b) the petitioner should have brought action at law against the municipality embracing the separate school dictrict to recover and collect a judgment *in personam* for the amount of his salary.

(A) We feel that consumption of time with prolonged argument upon the first plain, adequate, and speedy remedy, suggested by appellant, would not be justified by the seriousness of the point. That remedy is not at all a "remedy in the ordinary course of law," it has no applicability to a case of this character. In the sense of that statute, there is involved here no "controversy arising under the school law;" but simply the declination of a municipal clerk, disconnected from the school system, to perform a ministerial duty competently and properly enjoined upon him by the law, and by the orders of the trustees of a separate school district. *Hobbs et al.* v. *Germany et al.* (Miss.), 49 So. 515; *Moreau et al.* v. *Grandich et al.* (Miss.), 75 So. 434; *Kizer* v. *Toms, et al.*, 129 Iowa, 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496; *Perkins* v. *School District*, 56 Iowa, 476, 9 N. W. 356.

(B) The second and other "plain, adequate, and speedy remedy in the ordinary course of law," suggested by appellant as having been open to appellee in lieu of the extraordinary remedy of mandamus, was an action at law against the municipal corporation of the City of Bay St. Louis to recover a judgment *in per-*

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sonam for the amount of his salary. But how could this have been done? And is it "a plain, adequate, and speedy remedy? The City of Bay St. Louis as a municipal corporation, does not owe petitioner this amount. The employment of petitioner was by the separate school district, acting through its trustees, separate and apart from the municipal government. The theory of the law clearly is that the municipal corporation and the separate school district are not merged into one corporate entity, although their respective borders and populations may, or may not, be coincident (section 4533, Code of 1906, section 7361, Hemingway's Code). The funding of a separate school district system embodied or embraced within a municipality is conducted through the machinery of the municipal government for reasons of conveniences and economy, justified by the identity or interest of the populations of both city and district. But a claim for the salary of a superintendent of schools of such separate schools district, is not, in legal effect, a claim against the municipal corporation, any more than a claim for the salary of a superintendent of a rural separate school district would be a claim against the whole county in which the district might be situated; though for reasons of convenience and economy the funds of the municipal separate school district are kept in, and the salary of the superintendent of schools paid out of, the municipal treasury, upon a municipal warrant drawn by the municipal clerk on the order of the school trustees, but not directed to be issued by the governing board of the municipality. How could such a judgment be obtained plainly and adequately, and its payment enforced, against the city, as a municipal corporation? *Swan* v. *Buck,* 40 Miss. 268; *Kelly* v. *Wimberly,* 61 Miss. 548; *Klein* v. *Smith County,* 54 Miss. 254; *Brandt* v. *Murphy,* 68 Miss. 84, 8 So. 296; *Ross* v. *Wimberly,* 60 Miss. 345; *Hebron Bank* v. *Lawrence County* (Miss.), 69 So. 209, 19 American

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and English Encyclopedia of Law (92 Ed.), 787 and 798.

We beg leave to quote the exceedingly apt language of the learned editor of the L. R. A. in his monographic note, pages 331 and 332, L. R. A. 1916, expressing the doctrine that obtains in Mississippi: "The courts are practically unanimous in holding that an action against the city on the claim is not adequate within the meaning of the term as used in this connection. Such action is not against the same party, does not afford the same relief, as mandamus, and, in the absence of a statute providing some other means of enforcing a judgment against a municipality, leaves the holder of a claim still in need of a warrant and at the mercy of the same officer who now refuses to issue one."

Apart, separate, distinct and disassociated from the rural or county system of public schools, section 4525, Code of 1906 (section 7345, Hemingway's Code), prescribes and enumerates the powers and duties of the trustees of separate school districts.

Thus, in separate and distinct subdivisions of the sections, they are vested with the power, and obligated, (a) to prescribe and enforce rules for the government of the schools of the district; (b) manage and control the school property within their districts, and to employ janitors; (d) to appoint librarians; in short, to supervise, govern, manage and control the property and business of the schools within their respective separate districts; and to do and perform all manner of things reasonably necessary to the execution of those powers and the performance of those duties. In subdivision (j) of this section the trustees of the separate school district are empowered and obligated, "to elect a superintendent, if one be required, and a principal for each of the schools, and prescribe their duties and powers." By the provisions of subdivision "k" of the section, the trustees of the separate school district

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are required, "to elect teachers, fix salaries, terms of service, contract with them, and impose fines and penalties for neglect of duty, but they cannot contract with a principal or teacher who does not hold a license from the county superintendent."

Why is this distinction made by the legislature? Why should the legislature expressly enact that the trustees of the separate school district "cannot contract with a principal or teacher who does not hold a license from the county superintendent of education," and refrain from inhibition against their election of a superintendent who may not hold a teacher's license? Because the superintendent of the separate school district is neither in law nor in fact a teacher. He is not supposed to teach.

The superintendent of the public schools of a separate school district not being a teacher, but an officer whose duties are to supervise, oversee, and manage, as the agent or representative of the trustees not only the principals, teachers, janitors, and other employees, but also the general business affairs of the public schools of the district his duties no more cease, or his services end, when the actual session of the schools close, than while the schools are open to classes of pupils. The janitor's duties may not then cease; neither may those of the librarian; nor those of the care-taker of the school property; nor those of other employees and officers of the system, merely because the schools may not be open to classes of pupils. The faculty, the curriculum, equipment, and supplies for the next term must, in part, at least be engaged and arranged during the summer months; of necessity, many of the details of this work must be left by the trustees to the superintendent, whose general oversight, superintendence, and advice they have sought. It cannot with seriousness be maintained that the legislature intended that the janitors and librarians may be compensated

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for services rendered when the schools are not in session and the superintendent, who is not only doing other important work, but who is also supervising theirs, cannot be compensated.

For the reasons, the legislature has left to the sound discretion of the trustees of the separate school district a determination of all questions of school management, the necessity for a superintendent, the appointment or election of school employees or officials, their terms of service, and compensation, with the sole restriction that the principal or teacher contracted with by them must hold a license from the county superintendent of education, and even this statutory requirement for a principal or teacher has been eliminated by amendment, so far as the county superintendent is concerned, so that, in lieu of a license from him, the principal or teacher may have or hold a license issued by the state board of examiners or a diploma from the Industrial Institute and college, or the state university, or college of other states; or a license issued upon a certificate from other states, sections 7789-7791, inclusive, of Hemingway's Code, or a professional license issued by the state board of examiners, section 7816, Hemingway's Code.

In the absence of a showing of bad faith or fraud on the part of the trustees, no interference may be had with an exercise by them of these discretionary powers granted them by the legislature, either as to the terms or as to the compensation of officers and employees of the system, competently appointed or elected by them. In the absence of bad faith or fraud provide for the payment of his salary in monthly installments at the end of each month of service. Im- upon their part, nothing can be found in the laws to restrain or forbid the trustees of the separate school district from electing a superintendent of the public schools of their district for a term of one year, and to

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portant work exists for the superintendent of public schools of a separate school district in every month of the year. 35 Cyc. 1079; *Moon* v. *South Bend,* 50 Ind. App. 251, 98 N. E. 153 *Davis* v. *Public Schools,* 175 Mich. 105, 140 N. W. 1001; *Murray* v. *Wilkes-Barre Township School,* 33 Pa. Sup. Ct. 373.

We submit that the learned court below committed no error in deciding that the trustees of this separate school district, had competent authority to elect appellee superintendent of their district for the period of one year, with his salary payable monthly, there being no intimation made of an abuse of discretion, or of fraud on the part of the trustees.

Again, appellant maintains that he was without authority of law to comply with the orders of the trustees of the separate school district, and that the judgment of learned court below, directing the issuance of its writ of mandamus ordering him to do so, was erroneous, because there was presented to him no pay certificate of the county superintendent of education, officially approving and allowing appellee's salary as superintendent of the public schools of the separate district; and because there was adopted and promulgated no order of the board of Mayor and aldermen of his Municipality, directing him to draw and deliver to appellee the warrants upon the municipal treasury.

With great respect, appellee controverts these contentions of appellant. We submit that, under the law, no pay certificate of the county superintendent of education, or order of the board of mayor and alderman, was necessary or required to make valid the orders of the trustees of the separate school district that appellant issue to appellee the municipal warrants in payments of appellee's earned and allowed salary as superintendent of the public schools of the separate school district, and that the absence of such pay certificate of the county superintendent of education and of such

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order of the board of mayor and aldermen of the municipality, constitutes no legal reason or justification for appellant's refusal to perform his ministerial duty of complying with the school trustee's orders to issue these municipal warrants to appellee.

The expenses of the schools of the separate school districts, salaries of all types of employees, fuel, equipment furniture, etc., are met by the issuance of the municipal warrants by the clerk of the municipality on the orders of the trustees of the district. With the possible exception, now, of the salaries of principals and teachers, a pay certificate from the county superintendent of education is neither required nor necessary to legalize the issuance of the municipal warrants. As to principals' or teachers' salaries, the trustees have the power to write orders on the county superintendents of education to issue pay certificates. Most certainly the trustees of the separate school district can write orders directly to the municipal clerk to issue pay warrants in defrayment of all school bills, and salaries of school officials and employees; and no pay certificate of the superintendent of education would be necessary to require to validate the warrants, save possibly now as to those for the salaries of principals and teachers. Section 7348, Hemingway's Code, Laws of 1916, chapter 186.

Appellant throughout his brief contends that the superintendent of a separate school district, even in the large city systems is subject to the same qualifications and required to perform the same duties, not only as are the separate district school principals and teachers, but also as are the rural and county public school principals and teachers. To sustain his contention as to the superintendent of a municipal separate school district having to make monthly and term reports, he relies on sections 4563 and 4565, Code of 1906, sections 7379 and 7381, Hemingway's Code. Appellee here

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most respectfully controverts appellant's contentions and avers that neither of these sections applies to the superintendent of a separate school district system in any manner whatever. Paragraph "1," section 4525, Code of 1906; section 7345, Hemingway's Code, provides for the only reports required of any official or employee of a separate school district. Appellee further maintains that section 4565, Code of 1906 section 7381, Hemingway's Code, is in no way applicable to a superintendent of a separate school district, nor even to the principal or any teacher in a separate school district, because the term report required by this section, is in separate school districts, required to be made by the secretary of the trustees therein, and the penalty imposed for failure to make the required report is imposed against the separate school district by withholding the pay for the attendance of county children, and thus is neither assessed against superintendent, principal, or teacher, but against the district until the secretary of the trustees shall have complied therewith. Paragraph "1," section 4525, Code of 1906, section 7345, Hemingway's Code.

We submit that no law required that the trustees' order upon appellant to issue the warrants in payment of appellee's salary as superintendent of public schools of the district be accompanied by a pay certificate therefor issued by the county superintendent of education; or that the trustees' orders be validated by any order of the board of mayor and aldermen of the municipality embracing the district; and that the ruling of the learned court below to that effect is correct.

SYKES, J., delivered the opinion of the court.

Appellee, C. R. Tolbert, filed a petition for mandamus in the circuit court of Hancock county against Sylvan J. Lander. The petition in substance alleges that dur-

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ing the month of May, 1919, the trustees of the separate school district embraced in the municipality of Bay St. Louis at a regular meeting by proper resolution elected the petitioner, Tolbert, superintendent of the public schools of that separate school district to serve for a period of one year, beginning the 1st day of June, 1919. The salary of the petitioner as superintendent was fixed by the trustees at one thousand, eight hundred dollars per annum, payable in monthly installments of one hundred and fifty dollars at the expiration of each month of service during the year. The petitioner properly accepted the office of the superintendent and immediately entered upon his duties as such and fulfilled them, especially during the months of June and July. On July 9, 1919, the school trustees in regular session approved and allowed the petitioner's salary for June, 1919, and issued a formal written order upon the defendant, who was the secretary and clerk of the municipality of Bay St. Louis, to draw and deliver to the petitioner the municipal pay warrant for the amount of one hundred and fifty dollars. The order was duly signed by the trustees and referred to the laws governing the election and character of the employment of the petitioner. There was sufficient available money in the school fund to be applied to the payment of the warrant thus directed by the trustees to be issued by defendant. The defendant as secretary and clerk of the municipality, however, declined to comply with or to recognize this order of the trustees, and he still so declines. Practically the same proceedings were had and a written order issued by the trustees for the salary of petitioner for the month of July, and the clerk declined to issue the warrant in accordance with the order. The school trustees were notified of the refusal of the municipal clerk to issue these two warrants, and on August 19th passed an order reciting the election of petitioner as superintendent of the public

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schools of this district for the salary above mentioned payable monthly, that the petitioner had served and earned and was entitled to receive from the treasurer of the city the warrants for his salary for the months of June and July at one hundred and fifty dollars a month, and it was therefore ordered by the board of trustees that the secretary and clerk of the city be and he was thereby ordered and directed to issue the municipal warrants of the city for the two months services above enumerated. A certified copy of this order was transmitted to the defendant by petitioner, who in a letter again demanded the issuance of the two warrants for his salary for June and July. The clerk declined to issue these warrants, whereupon this petition for the writ of mandamus was filed by Tolbert, to which petition there was a demurrer interposed by the defendant. The grounds of the demurrer are as follows:

"(1) Because there is a plain, adequate and speedy remedy in the ordinary course of law.

"(2) Because said contract as alleged is void, the same being for a longer period than the scholastic year.

"(3) Because it is not alleged or shown that the plaintiff or petitioner presented or procured a pay certificate from the superintendent of education as provided by law.

"(4) Because it is not shown or alleged that the petitioner taught or that the school was in session during the period for which petitioner claims salary.

"(5) Because it is not alleged or shown that the months for which petitioner is claiming salary is within the scholastic year.

"(6) Because the defendant is without authority in law to issue warrants without the presentation of a pay certificate from the superintendent of education or any order from the board of mayor and aldermen.

"(7) For other reasons to be submitted at the hearing."

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This demurrer was overruled, and the defendant declined to plead further, whereupon a final judgment was entered in favor of petitioner.

It is unnecessary to consider in detail the various grounds of the demurrer, as these grounds may be considered under three general heads.

First. Is the superintendent of public schools of a separate municipal school district under the absolute control and management of the trustees of this district? Second. If so, are the trustees empowered to have their orders obeyed with reference to the issuance of warrants for the salary of this superintendent by the municipal clerk or secretary without an order from the county superintendent of eduacation? Third. Was mandamus the proper remedy for petitioner in this case?

Taking these questions up in the above order, section 4525, Code of 1906, section 7345, Hemingway's Code, prescribes the powers and duties of the trustees of separate school districts. Under section J, these trustees are empowered to elect a superintendent if one be required, and a principal for each of the schools, and prescribe their powers and duties. Under this subsection, the trustees have the power to elect a superintendent of all of the schools within this separate school district, and also to elect a principal for each of the separate schools, and prescribe the powers and duties of both the superintendent and the principal. Under subsection K, they have the power to elect the teachers, fix the salaries, terms of office, contract with them, "but they cannot contract with a principal or teacher the county superintendent, the superintendent of all the schools is not required to have a license. In other words, under this section the principal as well as the teachers must have a license to teach school, but no who does not hold a license from the county superintendent." It will be noted here that, while the principal and teachers of the schools must have a license from

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such license is required of the superintendent. The board of trustees have the right to prescribe the duties to be performed by the superintendent. It is a matter of common knowledge that, in a number of separate municipal school districts composed of the larger cities and towns of the state, there are a number of separate schools, and that in each one of these schools there is a principal, while for all of the schools there is one superintendent. This superintendent is required to supervise and look after all of the affairs of these separate schools in his district, under the instructions of the board of trustees. In other words, the superintendent is the executive officer who actively looks after the management of the schools under instructions of the trustees. It was not required that he be a school teacher or have a license to teach. His qualities consist rather in his executive ability instead of in his book learning. The legislature recognized this fact when they provided that the principal and teachers must have a license to teach, but omitted this provision from the subsection referring to the superintendent of the schools. Without referring in detail to the various school laws of the state, from a careful examination of them it is manifest that there are certain differences in the control and management of the municipal separate schools and the rural schools; that the school trustees in the separate municipal school districts have greater powers than those in the rural schools; that the county superintendent of education has very little voice in the control and management of the schools in the separate school district; he has no supervision or control whatever over the superintendent of these schools. It is inescapable from an examination of these laws that the trustees have the absolute control and management of the superintendent elected by them and have the right to prescribe his duties, fix his term of office, the amount of his salary, and in what manner it shall be paid.

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Second. There is nothing in the various school laws requiring the county superintendent of education to issue any order to the municipal clerk for the issuance of any warrants for the payment of any bills or accounts of a separate municipal school disctrict, except those relating to the salaries of the teachers and principal of a school. Under section 4525, Code of 1906, section 7345, Hemingway's Code, these school trustees are given the control and management of the school property and are empowered to employ a janitor, also a librarian, to furnish blackboards and other necessary furniture for the use of the schools. Section 7348, Hemingway's Code, chapter 186, Laws of 1916, expressly provides that these trustees are the custodians of the school property and shall have charge of the erection, repairing, and equipping of buildings, and are authorized to write orders to the clerk of the municipality or to the county superintendent to issue warrants or pay certificates on any available school funds of such school district. The only employees of a separate school district that are in anywise brought under the control of supervision of the county superintendent of education are teachers and principals. As to them the county superintendent may issue his order upon the municipal clerk for the issuance of their warrants; but as to the superintendent, librarian, janitor, or other employees of the district his warrant must be issued on the order of the trustees. In other words, the superintendent is not a teacher; he is not compelled to hold a teacher's license; he is responsible alone to the trustees, and not to the county superintendent, for the performance of his duties. There is no reason, and the law does not so provide, that his salary shall not be paid upon written order of the school trustees. From the powers and duties of these trustees above referred to we think it clear that it was the duty of the munici-

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pal clerk to issue these warrants in accordance with the orders of the trustees.

Third. Mandamus was the proper remedy. The clerk is a mere ministerial officer whose duty it was in this case to obey the order of the trustees. Neither the board of aldermen nor the county superintendent of education had the power or authority to give this order. There was no plain and adequate remedy at law. A suit against the municipality was no such remedy. The municipality had not declined to pay it; in fact, through its trustees as a separate school district, it had ordered the clerk to issue the warrant. A suit against the municipality would in reality in this instance have been a suit against this separate school district, which through its constituted authorities had ordered the issuance of the warrant. *Herbon Bank* v. *Lawrence County,* 109 Miss. 397, 69 So. 209; *Moreau* v. *Grandich,* 114 Miss. 560, 75 So. 434.

The judgment of the lower court is affirmed.

Affirmed.

CRESCENT COTTON OIL CO. *v.* STATE EX REL. COLLINS, ATTORNEY GENERAL.

[83 South. 680, In Banc. No. 20890.]

1. COMMERCE. *Operation of cotton gin as incident to purchase of cotton seed for interstate shipment not interstate commerce.*

Where a cotton oil mill operated a gin as an incident of its purchase of cotton seed for shipment to its oil mill in another state, and to enable it to purchase the seed more advantageously, in such case the ginning was a separate and distinct transaction from its purchase or shipment and was not interstate commerce and Laws 1914, chapter 162 (Hemingway's Code, sections 4752-4756), prohibiting corporations manufacturing cotton seed oil products from operating cotton gins except in the town where

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their cotton oil plant is located, is not invalid as a burden and interference with interstate commerce.

2. MONOPOLIES. *Attempting to destroy competition in cotton ginning by putting down price not unlawful.*

An attempt to destroy competition by putting down the price of ginning cotton below its actual cost does not violate subdivisions (M), (N), or (O), of the anti-trust Laws 1908, chapter 119 (Hemingway's Code, section 3283), as to destroying competition in the manufacturing or sale of commodities.

APPEAL from the chancery court of Sunflower county. HON. E. N. THOMAS, Chancellor.

Suit by the state on the relation of Ross A. Collins, Attorney-General, against the Crescent Cotton Oil Company. From a judgment for relator, defendant appeals. The facts are fully stated in the opinion of the court.

A. W. Shands, and *J. B. Harris,* for appellant.

(1) Conceding for the purpose of this argument, that a state has absolute right to exclude a foreign corporation from its borders or to expel it solely upon the ground that it is a foreign corporation, we assume that it will not be questioned at this day, that a state cannot exclude from its borders or expel therefrom and annex conditions or impose any burden either under guise of taxation, license fees, police regulations or otherwise, a corporation engaged strictly in business of interstate commerce. *Pullman Palace Car Company* v. *Kansas* 216 U. S. 68, 54 L. Ed., 386; *Bank of Augusta* v. *Earle,* 13 Peters, 519, 10 L. Ed. 274; *Pensacola Telegraph Company* v. *Western Union Telegraph Company,* 96 U. S. 1, 24 L. Ed. 708; *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 34, 54 L. Ed. 369; *McCall* v. *California,* 156 U. S. —, 34 L. Ed. 394.

This court, of course, is well aware of the fact that the supreme court of the United State never expressly overrules a case, and its last decision upon any ques-

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tion must be taken as the law regardless of the fact, the decision may be in apparent conflict with some former decision, but it must be remembered, however, that the supreme court of the United States deals with facts presented in the case before it, and what may be apparent conflicts are found not to be such when the facts in the particular case are analyzed and understood. There are, however, four recent decisions by the supreme court of the United States which taken together cover every phase of the branch of the case we are now considering, so complete and exhaustive are the decisions in these cases that we do not feel it necessary to burden the court with the great array of cases in which the questions have been repeatedly considered.

We refer to the following cases: *Western Union Telegraph Company* v. *Kansas, supra; Pullman Palace Car Company* v. *Kansas, supra; Ludwig* v. *Western Union Telegraph Company,* 215 U. S. —, 54 L. Ed. 435, and *Harrison* v. *Railroad Company,* 232 U. S. —, 58 L. Ed. 621.

In addition to the propositions already set forth the following propositions are established by the cases last cited.

(A) A burden imposed by a state on interstate commerce is not to be sustained simply because the statute imposing it applies alike to all of the people of all of the states, including the people of the state enacting the statute. *Minn.* v. *Barber,* 136, U. S. 313-319, 34 L. Ed. 455-457; 3rd Inters. Com. Rep. 185; *Robins* v. *Taxing District,* 120 U. S. 489-497, 30 L. Ed. 694-697; 1st Inters. Com. Rep. 45; *Crew Levick Company* v. *Pennsylvania,* 245 U. S. —, 62 L. Ed. 264.

(B) That a corporation engaged in interstate commerce cannot be deprived of the right to do a local or intrastate business in connection with said commerce as to do so would be to regulate and burden such commerce. The language of the court in the case of the

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Western Union Telegraph Company v. *Kansas,* 54 L. Ed. 336, is as follows: "But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the fields or domestic business in Kansas without its consent and without conforming with the requirements of its statute, but the disavowal by the state of any purpose to burden interstate commerce cannot exclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute reasoonably interpreted, either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid whatever may have been the purpose for which it was enacted, although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through the forms to the sustances of things, such is an established rule of constitutional construction, as the adjudged cases abundantly show." The court then proceeds to discuss numerous cases bearing on that point.

The court further said at page 363: "To carry on interstate commerce is not a franchise or privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience of carrying on their business cannot have the effect of depriving them of such rights, unless Congress should see fit to interpose some legislation on the subject. The rule on this subject is thus laid down in a note to the *Western Union Telegraph Company* v.

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Taggart, 60 Lawyer's Reporter Annotated at page 691.

If the business is actually a part of interstate commerce and assists in any degree in increasing or aiding in carrying on such commerce, it is beyond the power of the state to tax, citing *McCall* v. *California,* 136 U. S. 47, 35 L. Ed. 649.

The cases of the *Western Union Telegraph Company* v. *Kansas, Pullman Palace Car Company* v. *Kansas,* and *Ludwig* v. *Western Union Telegraph Company,* have been expressly reaffirmed by the supreme court of the United States in the case of the *International Text Book Company* v. *Pigg,* 217 U. S. —, 54 L. Ed. 687; *Railroad Company* v. *Conner,* 223 U. S. —, 56 L. Ed. 438; *Looney* v. *Crain Company,* 245 U. S. —, 62 L. Ed. 335.

In the case of the *International Text Book Company* v. *Pigg,* 217 U. S. —, 54 L. Ed. 687, the court said: "It is the established doctrine of this court that a state may not in any form or under any guise directly burden the prosecution of interstate commerce." This language was used in respect to the operation of the statute upon local matters.

Of course, it necessarily follows from the authorities which we have cited above and which are the last utterances of the supreme court of the United States on the subject, if the state could not impose a tax upon a local business carried on in connection with an interstate commerce, and make the payment of the tax or the filing of the statements a condition to the carrying on of the local business, manifestly the legislature could not under any guise or in any way prevent the carrying on of the local business thus related to and necessary to or in aid of the carrying on of interstate commerce.

(C) "That the police powers reserved to the state are such as incidentally affect interstate commerce and as such are established for the protection, safety and convenience of the people, and are not in themselves in any

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just sense, an obstruction to, or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the state and to be respected until Congress covers the subject by legislation." *Western Union Telegraph Company* v. *Kansas,* 54 L. Ed. 365. This view as to the restricted meaning of the police power as reserved to the state is fully supported in the cases of: *Chicago* v. *Sturgis,* 222 U. S. 113, 56, L. Ed. 215; *Lemieux* v. *Young,* 211 U. S. 489, 53 L. Ed. 285; *Cincinnati R. R. Co.* v. *Connersville,* 218 U. S. 336, 53 L. E. 1060; *Mutual Loan Company* v. *Martel,* 222 U. S. 225, 56 L. Ed. 175; *Austin* v. *Tennessee.* Speaking on the subject the court said: *Kidd* v. *Pearson,* 128 U. S. 120, 32 L. Ed. 345; *Salvage* v. *Jones,* 225 U. S. 501, 56 L. Ed. 1182; *Stockfood Company* v. *Wright,* 225 U. S. 540, 56 L. Ed. 1182; *Railroad Company* v. *Wharton,* 207 U. S. 328, 52 L. Ed. 230; *Express Company* v. *Commonwealth,* 214 U. S. 218, 53 L. Ed. 972; *Railroad Company* v. *Husen,* 95 U. S. 465, 24 L. Ed. 527.

Bearing on the question before this court it is settled that the supreme court of the United States is not concluded by a state's interpretation of its statute in matters involving constitutional protection, but will decide the question for itself. *Crew Levick Company* v. *Pennsylvania.* 245 U. S. 292, 62 L. Ed. 295; *St. Louis Railroad Company* v. *Arkansas,* 235 U. S. 363, 59 L. Ed. 271, and cases cited; also, *American Mfg. Company* v. *St. Louis,* advance sheets August 15, 1919, page 651. The power exerted is the test and not the reason given for its exercise. *Pullman Palace Car Company* v. *Kansas,* 216 U. S. 70, 54 L. Ed. 387; *Looney* v. *Crain Company.* 245 U. S. —, 62 L. Ed. 235; *Looney* v. *Crain Company, supra,* 62 L. Ed. 236. The decisions which we have reviewed and referred to above settle conclusively the following propositions as bearing on the case at bar.

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I. That a state cannot exclude or expel a foreign corporation engaged in interstate commerce.

2. That a state cannot either directly or indirectly under the guise of police power or otherwise regulate or burden interstate commerce.

3. That protection from state regulation is not confined to the matter of transportation or movement of commodities in interstate commerce, but extends to all those instrumentalities, corporate, conveniences, or facilities which assist in the carrying on or aiding such commerce.

4. That to deprive a corporation of the right to carry on a local business which is directly connected, and assists in any degree in increasing and aiding in the carrying on of such commerce is beyond the power of the state to control, because to deprive of this right would be to burden interstate commerce.

5. That a state statute cannot be upheld by the decision of the state court, or by a construction of a state court, that the statute is only intended to apply to local or intrastate business, but the validity of the statute under the Federal Constitution shal be determined by the Supreme Court of the United States upon its own judgment of the operation and effect of the statute irrespective of the form which it presents, or how it is characterized by the state court, the power exerted is the test and not the reason given for the exercise.

6. That the statute bears by its terms upon all persons and corporations in the state alike, will not sustain the statute if in its application to a particular corporation or person, it imposes either a direct or an indirect burden upon the interstate commerce and in the particular instance regulates it in effect.

This court must hold that the Act of 1914, chapter 164, either applies to corporations engaged in interstate commerce or that it does not apply to such. If it does not apply to corporations engaged in interstate com-

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merce, then of course the decree of the court below should be reversed because the appellant was engaged in interstate commerce to wit, the procuring of cotton seed was for interstate shipment exclusively.

If the court should say that the statute was only intended to and could only apply to and affect the local business or intrastate business and that operating a gin for the purpose of procuring cotton seed was local business, the statute cannot be applied to the appellant, and the decree must be reversed, because the only local business, if any done by the appellant, that is to say, the operation of the gin, was necessarily adjunct to its interstate commerce and was used exclusively in reference to such commerce for the purpose of aiding in said commerce only.

As to the effect of such a holding upon the statute we invited the court's attention to the case of the *Pullman Car Company* v. *Kansas, Western Union Telegraph Company* v. *Kansas, Luding* v. *Western Union Telegraph Company, International Text Book Company* v. *Pigg,* all reported in 54 L. Ed. and cited above.

This is not a statute partly constitutional and partly unconstitutional, so that its provisions can be separated and the constitutional part stand and the unconstitutional part fall, because the application of the statute to the appellant necessarily burdens its interstate commerce. To deprive it of the right to operate a gin in connection with its interstate commerce would be practically to destroy this business, whether the operation of the gin be treated as local or interstate business and the statute as to that must fall as to the appellant. The decree of the court below cannot be upheld upon any ground.

It was insisted by the attorney-general upon the argument on the application of a writ of *supersedeas,* that manufacturing is not commerce and that ginning is manufacturing. In fact the supreme court of the United

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States has held in the case of *Kidd* v. *Pearson*, 138 U. S. 120, 32 L. Ed. 346: "That manufacturing was not commerce, and that the fact that the manufacturer might have some intention at some time to ship the products from his factory out of the state in interstate commerce would not relieve him from the operation of the statute prohibiting the manufacture and sale of intoxicating liquor in the state."

The manufacturer in that case was not engaged in interstate commerce and by reading the case the court will see that his interstate commerce was merely a mental condition and not an actual condition. A mere desire to do an interstate business is not enough. 52 L. Ed. 828.

In the case at bar the appellant was engaged in an interstate business strictly, its whole purpose in coming into the state of Mississippi was to carry on an interstate business. It was actually engaged in that business at the time the Act of 1914 was passed and had been a long time prior to that time. Under the changed conditions it became necessary in order to acquire cotton seed for its mill in Tennessee that he should operate a gin, it was operating for that reason two gins in Mississippi and some gins in other states. It was shown conclusively that he had to either operate a gin or put himself at the mercy of the gin monoply, in order to get cotton seed to ship to his mill in Tennessee. The gin was merely a feeder to the oil mill, a necessary adjunct to the interstate commerce business of supplying his oil mill with cotton seed, but while we might concede that ginning is not commerce, it may become a very essential part of the commerce or instrumentality of commerce both local and interstate.

The question is not whether ginning is or is not commerce *per se*, but the question is, whether the operation of the gin was so related to the intersetate commerce as to aid in increasing and facilitating that

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business. The question is not whether the appellant might have been able to buy cotton seed or obtain cotton seed by some other method more expensive or burdensome. Under the testimony of this case, it is shown without dispute that it could obtain cotton seed more economically and more certainly and maintain its business more efficiently by the operation of the gin. The operation of gins having become the principal means of obtaining cotton seed its interstate business could not be otherwise sucessfully carried on.

The decree, as the court will see, forfeits the right of the appellant to do business in the state of Mississippi (following the language of the statute), and from operating a gin in the state of Mississippi that is the first part of the decree. In the subsequent paragraph of the decree the appellant is perpetually enjoined from doing any local or intrastate business in the state of Mississippi. The court cannot forfeit its right to do interstate business in the state of Mississippi, and therefore the decree of the court must be reversed on that ground, and under the authorities which are set forth above, it cannot be deprived of the right to do a local business in the state of Mississippi if that business is entirely related to and in connection with it and in aid of its interstate business and necessary to properly carry it on. To say that to deprive the appellant of the right to operate a gin in Mississippi upon the facts disclosed in this record would not be directly burdening its interstate commerce; it seems to us, that the language of an eminent state judge, would be "to cut the throat of reason, and knock out the brains of common sense."

There is no ground upon which the statute can be supported. It cannot be supported upon the ground that ginning is in any way inimical to the public health or comfort; on the other hand, ginning is recognized as a perfectly legitimate business. It certainly cannot be

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urged that an interest in an oil mill, or the operation of an oil mill is in any way inimical to the public welfare, so the statute cannot be supported as a police regulation under the numerous decisions of the Federal court which we have cited above, if that regulation in any way impedes or burdens or restricts interstate commerce.

Ross A. Collins and *Frank Roberson*, for appellee.

The bill filed by the state on the relation of the attorney-general is dual in phase. The first phase is that the Crescent Cotton Oil Company is operating gins in Mississippi in violation of chapter 162, of the Laws of 1914; the second phase is, that the defendant had no charter power to operate a gin. The prayer is for both special and general relief. The court is asked first to penalize the defendant by fine and exclusion from the state of Mississippi.

The answer of the defendant in the lower court, appellee, here, is threefold: First: That the Act is void because the company had invested in property in this state prior to the passage of the statute and to prevent the use of this property by the defendant would be to deprive the defendant ot its property without due process of law; Second; that the Act denies the defendant the equal protection of the laws guaranteed by the constitution of Mississippi and of the United States in that a corporation engaged in the oil mill or compress business cannot own or operate a gin, while an individual engaged in the same business is only denied the right to become interested in a corporation gin; Third: The defendant denies that its charter does not confer upon it the right to operate gins.

POWERS OF STATE TO EXCLUDE OR EXPEL CORPORATIONS.

I understand the argument of counsel for appellee on the right of Mississippi to exclude foreign corpora-

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tions to be, first that the right to exclude a foreign corporation which has filed its charter with the secretary of state under section 735 of the Code of 1906, and has made investments in property within the state, cannot be done under the reservation made in section 178 of the Constitution, and further it would not be a valid exercise of the police power; second, that where the act providing for the exclusion of the foreign corporations and individuals, such an act is discriminatory and is violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The power to regulate public gins is the putting into effect the public policy of this state as to oil mills, compress and gins. Section 914 of the Code under which the appellee does business in Mississippi specifically provides: "but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereto." It is elementary that the public policy of any state is in a constant condition of change. Innumerable instances of changes in public policy will occur to the court. It necessarily follows, therefore, when the Crescent Cotton Oil Company entered Mississippi that it was charged with notice that the public policy of the state as it then existed, and as it might be in the future, would have to be taken into consideration when it came in and be obeyed thereafter. Furthermore, section 178, of the constitution of Mississippi, which evidences one of the great changes in the public policy of this state, provides the legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created whenever in its opinion it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stockholders."

The power necessarily exists to exclude a foreign corporation doing business within this state, which has

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made investments in property prior to the passage of the statute changing the public policy. If the state were impotent to exclude the foreign corporation having acquired property rights prior to the passage of the act, it might be successfully argued that section 178 of the Constitution would be contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that a domestic corporation could have its charter repealed by the state while a foreign corporation doing the same business as a domestic corporation could not be excluded according to the appellee's contention, because it had acquired vested property rights within the state. This is the effect of the contention of appellee when the contention is transferred from a foreign corporation doing business within the state, to a domestic corporation.

STATEMENT OF ABSTRACT LEGAL PRINCIPLES PERTAINING TO CORPORATIONS AND FEDERAL CONSTITUTION.

For purposes of convenience, I desire, at this point, to set forth certain abstract principles of law without citing the authorites upholding the same, which will later be given in this brief.

A corporation is not a citizen within the meaning of the Fourteenth Amendment, prohibiting the states from making or enforcing any law abridging the privileges or immunities of citizens of the United States. A corporation is a person under the Fourteenth Amendment, giving all persons equal protection of the laws. A corporation is a person within the meaning of the process clause of the Federal constitution.

THE ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF CONSTITUTION OF UNITED STATES.

Leading cases, *supra*, are *United States* v. *Lake Shore & M. S. Ry. Co. et al.*, 203 Fed. 295; *United States* v. *Delaware & Hudson Company*, 1909, 213 U. S. 366, 53 L. Ed. 836; *Del. L. & W. R. Co.* v. *United States*, 231

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U. S. 363, 58 L. Ed. 269; *Lemieux* v. *Young*, 211 U. S. 491, 53 L. Ed. 295.

DOES NOT CONTRAVENE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The court will be very careful to notice the cases the statute under review does not discriminate as between foreign and domestic corporations cannot be applicable to the statute under review, for the reason that the statute under review does not discriminate as between foreign and domestic corporations; the same penalty in effect is imposed on each. The foreign corporation is excluded, whereas the charter of the domestic corporation is repealed and forfeited. This is the sole method by which equal penalties could be imposed since the domestic corporation cannot be excluded, but the charter must be revoked or forfeited, so, the contention as to discrimination in the statutes between foreign and domestic corporations is without merit, since the situation complained of does not exist in the state.

The question of discrimination cannot be considered in this case for the reason it pertains solely to the question of the power of the state to prevent an oil mill or compress corporation from doing a ginning business. The question as to the equal protection of the law can only arise with reference to concerns which have the right to do a given line of business in the state; but if the question of discrimination between corporations and individuals is to be considered, we shall discuss this phase more fully hereafter. *State* v. *Louisville & Nashville R. R.*, 97 Miss. 35, 51 So. 918; *Harrison* v. *St. Louis & S. F. R. R. Co.*, 232 U. S. 318, 58 L. Ed. 261.

Councel for appellee also refers to the case of *Herndon* v. *Chicago & Rock Island R. R. Co.*, 218 U. S. 135, 54 L. Ed. 980. In that case, the court was dealing with two statutes of Missouri, one requiring all passenger

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trains to stop at all junction points a sufficient length of time for passengers to disembark; and the other, to revoke the right to do business within the state of any corporation attempting to remove a case to the Federal court. The carrier made two contentions which were, that the first statute was an interference with interstate commerce and contrary to the commerce clause; that the second statute was an interference with judicial power of the United States.

There is nothing in this case that even intimates that a foreign corporation, not engaged in the business of carrying interstate commerce, but engaged in intrastate business, might not be expelled by a statute that allowed a reasonable time to dispose of the property, even though the property had been already acquired; when at the same time a domestic corporation doing the same prohibited act as the foreign corporation would incur in effect the same penalty; and this, too in a state which has a constitutional provision providing for the repeal, alteration or amendment of the charter of any domestic corporation where no injustice is done to the stockholders.

The distinction between the case cited by appellee and the one before this court is clear and distinct. No question of the commerce clause is involved; no atempt to interfere with the judicial power of the United States is made; no equal protection of the laws as between persons similarly situated is denied; no unreasonable or arbitrary classification is made in the statute.

Appellee's brief cites the case of *Southern Railway Company* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536, and makes copious quotations therefrom. The state of Alabama attempted to impose an additional franchise tax on foreign corporations doing business in that state, which statute did not apply to domestic corporations engaged in the same business.

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This case, it will be seen, deals with corporations having the right to do business in Alabama, and that are carrying on their business in compliance with the laws of that state, while the case at bar deals with corporations that are prohibited from doing a certain character of business here; so, the question of equal protection of the law cannot be applicable because the corporation cannot be said to be lawfully doing business in Mississippi. This conclusion cannot be diputed successfully by appellees, for the reason that counsel for appellee admit in their brief that the regulation of ginning is a proper subject for the exercise of the police power of the state.

The court in the *Alabama case, supra,* on page 539 of 54 L. Ed. said: "The important Federal question for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature upon which it has paid all taxes levied by the state, is liable to a new and additional franchise tax for the privilege of doing business in the state of the same character as that in which the foreign corporation is itself engaged?"

The equal protection of the laws means subject to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama, within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon other persons in alike situation. *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1, 54 L. Ed. 355, was a case strongly relied upon to declare invalid our anti-removal statute; but in this case, the court said, on page 368: "But it is said to be well settled that a state, in the exercise of its reserved powers, may prescribe the terms on which a foreign

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corporation, whatever the nature of its business, may enter and do business within its limits.

"It is true, that, in many cases, the general rule has been laid down that a state may, if it chooses or imposes such terms and conditions on their doing business in the state as in their judgment, may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business, is not directly or regularly in interstate or foreign commerce."

A corporation is not a citizen within the Constitution of the United States, article 4, section 2, clause 1, declaring that the citizens of each state shall be entitled to all the priviliges and immunities of the several states, nor the Fourteenth Amendment to the said constitution prohibiting the state from making or enforcing, any law abridging the privileges or immunities of citizens of the United States. *State* v. *L. & N. R. R. Co.*, 97 Miss. 35; *Berea College* v. *Ky.*, 211 U. S. 45, 53 L. Ed. 81; *Western Turf, Assoc'n* v. *Greenberg*, 204 U. S. 359, 51 L. Ed. 520; *Selover Bates & Co.* v. *Walsh*, 226 U. S. 112, 57 L. Ed. 146; *Pembina Silver Mining Co.* v. *Penn*, 125 U. S. 181, 31 L. Ed. 650.

The legislature has a wide discretion in making classifications for legslative purposes: *Huggins* v. *Home Fire Ins. Co.*, 107 Miss. 650, 65 So. 646.

The classification of persons or property must be based on some reasonable ground and some rule different from mere arbitrary selection, and discriminations against persons and classes of unusual character are unconstitutional. *Adams* v. *Standard Oil Co. of Ky.*, 97 Miss. 879, 53 So. 692.

This decision expressly recognizes that corporations and persons may have different classifications as a matter of right and will be discussed more fully hereafter; therefore, there is no denial to appellee of the equal protection of law as against indiviluals. The con-

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stitutional ground of equal protection of the laws means subject to equal laws applicable to all in the same situation. *Adams* v. *Standard Oil Co. of Ky., supra*; *Gulf, etc., R. Co.* v. *Ellis,* 115 U. S. 150, The exemption of designated persons from the operation of statutes does not deprive persons of the equal protection of the laws, *Minn. Iron Co.* v. *Kline,* 199 U. S. 593, 50 L. Ed. 322.

That persons engaged in the same line of business are classified and different provisions are applied to each class, does not deprive them of the equal protection of the law. *St. John* v. *N. Y.,* 201 U. S. 633, 50 L. Ed. 896; *U. S.* v. *Kruikshanks,* 92 U. S. 542, 23 L. Ed. 588.

The case of *Ballard* v. *Oil Company,* 81 Miss. 506, is relied on by the appellee as authority for the invalidity of the Act of 1914 under review. It is contended that this case held a statute unconstitutional because it discriminated between corporations and individuals. We do not agree that this was the ground on which this case was decided. In our opinion, that statute was held to be unconstitutional because it applied to all corporations as against individuals, and the opinion of the court was that the statute was unconstitutional because the classification of all corporations was arbitrary, and that the classification should have been limited to railroads and corporations in a similarly hazardous business. It was on the ground of unequal protection, not withdrawing charter power.

Our own supreme court has always distinguished subsequent cases from the Ballard case, our own courts have never placed the same construction upon this decision as is contended for by appellee. In the Ballard case, the court did not have under consideration the power of the railway company to do railway business within the state. The exact question involved in our case is the power of the legislature to prohibit a corporation from doing a certain particular business within

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the police power. The question of the equal protection of the law arose in the Ballard case because the railway company had the power to do the particular business, but in this case the power is the thing that is exercised by the legislature and the equal protection of the law. Defense does not and cannot arise until the corporation has the power to do the particular act. So it follows that the Ballard case is not in point even if it be correctly decided, and it must be admitted that the Ballard case now stands single and alone, all the other courts, including the supreme court of the United States, have held that it is proper to make rules with reference to corporations not applicable to individuals.

In *Adams, State Revenue Agent,* v. *Standard Oil Company, of Kentucky,* 97 Miss. 879, 53 So. 692, our supreme court cited the Ballard case, and held that a classification between the Standard Oil Company in peddling, and the aged and inpecunious and physically disabled from paying a peddler's license is based on existing conditions founded on reason and justice, and is not violative of the equality clause of the Federal Constitution. This case was a clear distinction between a corporation and an individual each of whom was doing a peddling business, but the court held that the classification and discrimination was not unreasonable and arbitrary, but was valid. The court said that the Ballard case was not authority against such a discrimination, but that that case only decided that the classification must be reasonable and not arbitrary.

The supreme court of the United States has held since the decision in the Ballard case, that a reasonable classification as between corporations and individuals was not invalid and contrary to the equal protection of the last clause of the Fourteenth Amendment.

Corporations may be governed by laws that do not apply to or affect the rights of individuals. *Hammond Packing Company* v. *Arkansas,* 212 U. S. 322, 53 L.

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Ed. 530; *Standard Oil Co.* v .*Tenn.*, 217 U. S. 413, 54 L. Ed. 817; 2 Watson on the Constitution page 1211, et seq.; *State* v. *Rickeek* (Ind.), 77 1085, 5 L. R. A. (N. S.) 874.

PROPERTY ACQUIRED PRIOR TO PASSAGE OF ACT DOES NOT DEPRIVE THE STATE OF ITS POWER TO REGULATE AND EXCLUDE UNDER POLICE POWER OF THE STATE.

It seems to be argued by counsel for appellee, on page 10 of his brief, that the power of a state to expel a foreign corporation cannot be exercised where the business conducted is lawful at the time of the entrance into the state and is not violative of the public policy at that time. This contention, followed to its natural conclusion, would mean utter stagnation in the business of any state, since the right to control foreign corporations would be limited by the public policy as existing at the time of its entrance into the state. The logical sequence of such a condition would be that the state could not then control domestic corporations under a progressive and changing public policy for the reason that a domestic corporation would then be discriminated against in favor of a foreign corporation. When the Cresent Cotton Oil Company came into Mississippi, it came with the knowledge that is must be governed by the public policy of a state; must be as fixed as the laws of the Medes and Persians. But the legislature cannot by any grant or franchise deprive itself of the power of making any needful police regulations, the police power being inalienable even by express grant. *Charleston* v. *Goldsmith*, 2 Speers (S. C.) 428; *New Orleans Gas Light Co.* v. *La. Light, etc., Co.*, 29 L. Ed. 516; *Boston Beer Co.* v. *Mass.*, 24 L. Ed. 989; *Mich. Tel. Co.* v. *Charlotte*, 93 Fed. 11; *Esconaba Company* v. *Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Brown* v. *Keener*, 74 N. C. 714; *Pool* v. *Teexler*, 76 N. C. 297; *Hadecheck* v. *Sebastian*, 239 U. S. 394, 60 L.

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Ed. 348; *Pembina Consolidated Silver Mining Co.* v. *Penn.*, 125 U. S. 181, 31 L. Ed. 650.

LEGISLATURE HAS RIGHT TO ALTER, AMEND, OR REPEAL A CHARTER UNDER SECTION 178 OF MISSISSIPPI CONSTITUTION.

Citizens Saving Bank v. *Owensboro*, 173 U. S. 636, 644, 43 L. Ed. 840, 843, 19 Sup. Ct. Rep. 530, 571; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. Ed. 723; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 53 L. Ed. 530; *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 Law Ed. 342. A foreign corporation has no absolute right of recognition and may be regulated in such state, both as to its admission and its conduct. *Southern Bldg. & Loan Ass'n* v. *Norman*, 98 Ky. 304, 56 Am. St. Rep. 373, 32 S. W. 954, 31 L. R. A. 43; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, on page 360; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 86.

DISCRIMINATION BETWEEN INDIVIDUALS CANNOT BE RAISED IN THIS PROCEEDING.

Counsel in his brief for the appellee argues that the statute is unconstitutional because it discriminates between individuals. No such defense is made in the answer. The answer limits the discrimination between corporations and individuals and says nothing about a discrimination as between individual and individual.

It is no concern of the appellee in this case as to whether there is a discrimination between individuals or not, since it is not an individual. *Hammond Packing Co.* v. *Arkansas, supra.*

METHOD OF EXPULSION NOT LIMITED TO QUO WARRANTO PROCEEDINGS.

It is argued by appellee that the state is endeavoring to use a mistaken remedy by filing a bill in chancery to forfeit the right of the appellee to do business in this state and to expel it from the state. It is

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insisted that the remedy is by *quo warranto* under section 4017, of the Code of 1906.

We think it a sufficient answer to say that the writ of *quo warranto* is not exclusive but that chapter 162, Laws of 1914, is another, different and concurrent remedy. Both remedies exist at the same time; one is in a court of law and the other in a court of equity.

We submit, therefore, that the statute does not arbitrarily classify corporations and individuals is reasonable and based on actual conditions of which the legislature had knowledge; that the statute does not deprive the appellee of its property without due process of law as used in the constitution, nor is it denied the equal protection of the laws; and that the very life of small independent oil mills and privately owned gins depends on the validity of this statute being upheld.

It is elementary that if the court is doubtful about the constitutionality of the statute, the doubt should be resolved in favor of the constitutionality and every enactment of the legislature is presumed to be constitutional. *Pensacola Electric Co.* v. *Doderland,* 53 So. 772. If the appellee is dissatisfied with the purpose of this statute, its remedy is at the polls and not in the courts.

SYKES, J., delivered the opinion of the court.

This is the second appearance of this case in this court. Upon the former appeal we held that chapter 162 of the Laws of 1914 (section 4750 et seq., Hemingway's Code), was constitutional. This case is reported in 116 Miss. 398, 77 So. 185, and reference is here made to that report for a more complete history of the case. Upon the remand of the case to the chancery court the oil company upon motion was allowed to make the following amendment to its answer:

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"Respondent, Crescent Cotton Oil Company, would show that it is engaged, and had been for a long time prior to the passage of the act of 1914, mentioned in the said bill, engaged, in the operation of a cotton oil mill in the state of Tennessee, and in order to procure seed to run the said oil mill was during all of said time engaged in the buying of cotton seed in the state of Mississippi, and that all seed bought in the state of Mississippi were shipped in interstate commerce from the state of Mississippi into the state of Tennessee.

"This respondent would further show that conditions arose which rendered it impossible for a person not operating a gin to compete sucessfully with a person owning a gin in the purchase of cotton seed.

"Respondents would show that in order to stay in the market and continue to buy seed at Rulevlle, to be so shipped in such interstate commerce, it was necessary for it to acquire and operate a gin plant, which it did in 1910, and has continuously operated same since that time, and that the ownership and operation of said gin was a means and instrumentality made use of by this respondent in carrying on its business of cotton seed buyer and interstate shipper of cotton seed, and that the operation of said gin was an incident to the business of cotton seed buyer, and was a necessary and essential incident.

"Respondent would further show that to deprive it of the right to own and operate its gin plant will greatly burden and destroy its business of interstate commerce, in the shipment of cotton seed from the state of Mississippi into the state of Tennessee, and would be in conflict with the commerce clause of the Constitution of the United States, being subdivision 3 art. 1, section 8. Respondent would further show that it is now engaged in no business in the state of Mississippi, and was not at the time of the passage of this act or the filing of this suit, or at any time prior thereto, except

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such as is necessary to acquire cotton seed and ship them in interstate commerce and incident to such business of interstate shipper of cotton seed."

The testimony in the case for the complainant showed that at various and sundry times when the other cotton gins at Ruleville would not agree to sell to the defendant oil mill a certain amount of seed bought by them, the defendant would put down the price of ginning below its actual cost, for the purpose of destroying competition in ginning. The testimony also showed that the ginner has a great advantage in the buying of cotton seed over one who doesn't operate a gin; that at Ruleville it is almost the invariable custom of the cotton owner who wishes to sell his seed to sell it to the one who does his ginning. From the testimony it appears that the ginning business of the appellant company at Ruleville is operated in this manner. The owner of the cotton in the seed brings his cotton to the gin, and if he wishes to sell the seed to the gin the cotton is then ginned, and the seed blown into the seed house of the defendant. The lint cotton is then baled and gotten by its owner. It seems from this testimony that the defendant company actually negotiated for the purchase of the seed before the cotton was ginned. If the owner of the cotton does not sell his seed to the gin the seed are not blown into the seed house of the gin, but are reloaded on the wagon of the owner. The record does not show what proportion of the seed of cotton ginned by the defendant company is thus purchased by it. One who operates a cotton gin is thereby enabled to buy a larger quantity of seed, and at a more reasonable price than he would did he not operate a gin. In other words, the advantages in operating a gin are that the ginner is thereby given a better opportunity to buy seed from the person who gins with him, and also probably at a lower price, than if he did not own and operate the gin. The manager of the defendant

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oil company testified that in order for him to buy as much seed as he needed in his own mill business and at an advantageous price, it was necessary for him to operate cotton gins. He also testified that his mill operated eleven different cotton gins, two being in Mississippi, and the others probably in Arkansas and Tennessee. The testimony for the complainant in the case further shows that the seed bought by the other gins at Ruleville were sold to other oil mills. That it was usually customary for them to make arrangements with some oil mill to sell the seed bought by them to these mills for a certain profit. The testimony for the defendant also shows that it made money from its ginning operations at Ruleville. From all the testimony in the case, we think it proves that an oil mill in operating a gin is enabled thereby to purchase a larger volume of cotton seed at a lower price than is possible by being forced to go into the open market for for cotton seed, or having to buy these seed from other gins.

The uncontradicted testimony in the case shows that all of the seed bought by the defendant company from its ginning customers were bought for the purpose of shipment, and were actually shipped to its oil mill in Memphis, Tenn. To use the phrase of the general manager of the defendant company, this gin was used as a feeder for its oil mill in Memphis, Tenn., meaning that its principal object and purpose in running the gin was to enable it advantageously to purchase these seed from its customers for shipment to its oil mill in Memphis.

The decree of the chancery court found that the Crescent Cotton Oil Company was guilty of violating the above law, and also of violating the anti-trust statute. Chapter 119, Laws of 1908 (section 3283, Hemingway's Code). The oil company in this decree is perpetually enjoined from operating a cotton gin in Mississippi,

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and was given ninety days within which to dispose of its two gins in this state, in default of which a receiver is to take charge of these gins and sell them at public auction to the highest bidder, in thirty days. The defendant oil company is also perpetually enjoined from doing an intrastate business in the state of Mississippi, and is enjoined from violating the anti-trust law. For the violation of chapter 162 of the laws of 1914 (sections 4752-4756, Hemingway's Code), the defendant company was fined one thousand nine hundred dollars, and for a violation of the anti-trust law it was fined one hundred dollars. The decree also provides that the defendant oil company shall forfeit its right to do business in the state of Mississippi. From this decree this appeal was prosecuted.

It is the contention of the appellant, and ably presented in brief and oral argument, that the question now before the court is different from that on former appeal; that the testimony here shows that the defendant oil company was engaged in interstate commerce, namely, in shipping cotton seed from Mississippi to its oil mill in Tennessee; that as an incident to this interstate commerce and in order to obtain what seed it needed at a reasonable price, it was necessary for it to operate the two cotton gins in Mississippi; that the operation of these two gins is but an incident of its interstate commerce business, namely, that of shipping cotton seed from Mississippi to Tennessee; therefore, that it is a burden on, and an interference with, interstate commerce to prohibit this mill under these circumstances from operating gins in Mississippi; that the gin is but an incident, and not the dominant object or business of the defendant company; that in this case the interstate commerce is the paramount and dominant business, and the operation of the gin a mere incident in aiding and assisting the carrying on of the interstate business. To sustain this contention the learned counsel for ap-

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pellant rely upon the cases of *Pullman Palace Car Co.* v. *Kansas,* 216 U. S. 65, 30 Sup. Ct. 232, 54 L. Ed. 385; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; *Harrison* v. *Railroad Co.,* 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187.

In the first two cases above cited the statute of the state of Kansas was involved, which attempted to tax as a charter fee a given per cent. of the entire authorized capital stock of a foreign corporation as a condition of its continuing to do a local business in the state. This was held to be a burden and a tax on the company's interstate business and on its property located or used outside of the state. The Ludwig case is quite similar, involving a statute of the state of Arkansas.

The Harrison case holds that the right of a foreign interstate railway company to remove a case to the federal court under proper circumstances cannot be prohibited by a state statute.

None of the points actually decided in any of these cases is authority or applicable to the point before the court. The question of what is or what is not a burden on, or an interference with, interstate commerce is ably discussed in these opinions, especially in the case of *Western Union Tel. Co.* v. *Kansas, supra.*. In that case Mr. Justice Harlan reviews at length the decisions of the supreme court of the United States bearing upon this question. It is to be noted, however, that every case above cited is one in which the principal business of the corporation was interstate business, though these corporations also did an intrastate business. In the case at bar it is admitted by counsel for appellant that the ginning of cotton is not interstate commerce. This is undoubtedly true under all of the authorities. But counsel contends that the ginning and the interstate

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commerce are so interwoven and intermingled that they are inseparably connected in this case because of the fact that appellant was engaged in interstate commerce in shipping the cotton seed from Mississippil to Tennessee. In this case, however, after a price had been agreed upon for the cotton seed, and the seed thereby sold to the defendant company, it was necessary for the seed to be separated from the cotton by the process of ginning. In this ginning process the seed of the appellant were blown into his seed house. After which time, either immediately or at a later date, the seed were shipped by appellant in interstate commerce from Mississippi to Tennessee. The buying of the cotton seed was not interstate commerce, the ginning of the cotton was not interstate commerce, and it only became interstate commerce after it had been tendered to and accepted by the interstate carrier for transportation from Mississippi to Tennessee. It makes no difference what the purpose of the appellant company was in erecting and operating its ginning plants at these two points in Mississippi. By their operation it was doing what is well recognized as a business, namely, the ginning of cotton within the state of Mississippi. It is well settled by all of the authorities that the state has a right to regulate its internal affairs, and a ginning plant operated in Mississippi is of this classification. In one sense of the word, ginning is manufacturing seed cotton into lint cotton and cotton seed.

The purchase of the cotton seed is a separate and distinct transaction from the ginning of the seed, and the ginning of the seed is a separate and distinct transaction from the shipping of these seed from Mississippi to Tennessee. In other words, before these seed become a part of interstate commerce, or before this defendant company becomes engaged in interstate commerce in this transaction, it has to do three things; namely, purchase the seed, gin the cotton, and then deliver

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these seed to a carrier for interstate shipment. The fact that the defendant company had purchased the seed from the owner before the ginning of the cotton, and was the owner of the seed at the time of the ginning, and intended at some future time to ship these seed from Mississippi to Tennessee, does not make the ginning of this cotton interstate commerce.

In the case of *Kidd* v. *Pearson,* 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, the supreme court of the united States through Mr. Justice LAMAR, in holding a law of the state of Iowa, authorizing the abating as a nuisance of a distillery used for the unlawful manufacture and sale of intoxicating liquors, not unconstitutional as an attempted regulation of interstate commerce, in part says:

"We think the construction contended for by plaintiff in error would extend, the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is: Congress shall have power to regulate commerce with foreign nations and among the several states,' etc. These words are used without any veiled or obscure signification. 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 9, 6 L. Ed. 23.

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and

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selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile* v. *Kimball,* 102 U. S. 691, 702, 26 L. Ed. 238, 241, is as follows: "Commerce with foreign countries and among the states strictly considered consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management. . . . .

"It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the state of Iowa, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the state by lessening the amount of intoxicating

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liquors exported. But it does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the state respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. . . .

"'As has been often said, "legislation (by a state) may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution," unless, under the guise of police regulations, it 'imposes a direct burden upon interstate commerce,' or 'interferes directly with its freedom.' *Hall* v. *De Cuir,* 95 U. S. 485 (24 L. Ed., 547, citing authorities). . . .

". . . The manufacture of intoxicating liquors in a state is none the less a business within that state because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other states. . . .

"Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed

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to the common carrier for transportation out of the state to the state of their destination, or have started on their ulimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimnation, in the usual way and manner in which such property is taxed in the state; . . . that such goods do not cease to be a part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." *Coe* v. *Errol,* 116 U. S. 517 (6 Sup. Ct. 475), 29 L. Ed. 715.

Another case directly in point is that of *Hammer* v. *Dagenhart,* 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1103, 3 A. L. R. 649, Ann. Cas. 1918E, 724. In this case the court held that Congress did not have authority under the commerce clause of the Constitution to pass a law to control interstate shipments of child-made goods. In the course of his opinion Mr. Justice DAY said:

"The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. . . . when offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate com-

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merce transportation does not make their production subject to federal control under the commerce power.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. 'When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.' Mr. Justice JACKSON in *Re Green* (C. C.), 52 Fed. 113"—citing authorities.

The above two authorities from which we have so liberally quoted, and the authorities cited by them, sustain the proposition that it makes no diffeernce for what purpose the appellant operated this gin or what was his intention with reference to the cotton seed he bought from the owner; that the ginning is an entirely separate and independent and local business, and is not interstate commerce; and this law which prohibits this mill from owning the gin is in no sense a burden on interstate commerce.

The testimony for the complainant in the case shows that the appellant attempted to destroy competition by putting down the price of ginning below its actual cost This was not a violation of either secton (m), (n), or (o) of the anti-trust law as alleged. That part of the decree so finding is therefore reversed, and the fine of one hundred dollars annulled and set aside The remainder of the decree is affirmed.

Affirmed in part, and reversed in part.

ETHRIDGE, J., having been of counsel, took no part in the decision of this case.

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HENRY v. LAMENSDORF.

[83 South. 727, In Banc. No. 20969.]

BROKERS. *Employee of buyers who refused commission offer from seller's agent and acted for buyers not entitled to recover half of commission voluntarily paid their agent by sellers.*

Where the bookkeeper for buyers of a plantation did not accept the proposition of the agent for the sellers to act as sub-agent, but refused his offer to share commissions and elected to represent his employers in an effort to buy at a lower than the list price, negotiating direct with the sellers, and acting for the buyers without intimating either to the sellers' agent or the sellers that he was representing the latter, he is not entitled to recover from the sellers' agent half of the commissions voluntarily paid such agent by the sellers.

APPEAL from the chancery court of Yazoo county.

HON. LAMAR F. EASTERLING, Chancellor.

Suit by Sam Lamensdorf by next friend against Claude W. Henry. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

Barbour & Henry and *Fulton Thompson,* for appellant.

Barnett & Perrin, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellee, Sam Lamensdorf, as complainant in the court below, exhibited his bill in equity against appellant and also against Barbour and Coker, by which he seeks a discovery of the exact sum of money alleged to have been due as commissions for the sale of a certain plantation and a recovery of a portion of

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said commissions. The prominent facts are that appellant, Claude M. Henry, was engaged in the business of a real estate broker and had a contract with Barbour and Coker, joint owners of Duck Pond plantation in Yazoo county, by the terms of which Henry was authorized to find a purchaser. Henry advertised the lands for sale in a newspaper, and this advertisement attracted the attention of appellee, Lamensdorf, of Gilmore, Ark. Appellee thereupon wrote Mr. Henry the following letter:

"Thompson & Richards, Planters and Ginners, Gilmore, Arkansas.

"Mr. Claude Henry—Dear Sir; Saw your ad. in the Commercial Appeal and am of the impression that I could turn your deal for you at about eighty-five thousand dollars, for the whole place, implements, mules, corn and everything, less five per cent., or net it at eighty-two thousand, five hundred dollars, as I can get some good men interested in it, if you will give me a thirty-day option. Please let me hear from you by return mail and quote your best price.

"Yours truly, S. LAMENSDORF."

To this letter Mr. Henry replied as follows:

"YAZOO City, Miss., Jan. 11, 1918.

"Mr. S. Lamensdorf, Gilmore, Arkansas—Dear Sir: Your favor of Jan. 9th with reference to Duck Pond plantation received.

"I am putting out a thirty-day option on this particular property. When your parties are ready to start, if you will advise me of that fact I will give them a five-day option to protect them in their inspection and negotiation here, unless five-day option has already been given to party inspecting.

"This is an exceedingly fine property, Mr. Lamensdorf, and we are not putting it into the market to be kicked around from pillar to post at an arbitrary price. In advance of a party getting on the ground and thor-

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oughly acquainting himself with what we have the price is fifty dollars an acre for two thousand, five hundred acres, personal property included. If party does not care to inspect on that basis that is a matter immaterial to us.

"I will be glad to protect you in one-half the commissions I make on the deal if same is made by or through your agency. The listing is at one hundred thousand dollars net for the realty, and one hundred and ten thousand dollars for realty and personalty. Personally I seriously doubt that parties will take an amount appreciably less than that. In view of the fact that they cleared twenty thousand dollars this year they have good reason for not doing so.

"The property is well supplied with good, satisfied labor all signed up for the coming year. It has forty tenant houses, a Murray four-stand gin, a seven-room plantation home, five large barns, one store, an implement house, blacksmith shop, a pond covering an acre or more; a fine creek is on the eastern boundary. It is well drained naturally, and needs little attention in that respect. Its entire acreage is in the delta. It is beautifully located. The owners are doing fall plowing which will be charged to buyer.

"Interest your parties, and get them down here; they will be coming to look over a fine proposition.

"Yours very truly, [Signed] CLAUDE HENRY."

Appellee never at any time acknowledged the receipt of Mr. Henry's letter, and in no way advised Claude Henry that he, the appellee, would accept the proposition of sub-agency. On the contrary, Lamensdorf wrote the following letter direct to Duck Pond plantation:

"Planters and Ginners, Gilmore, Ark.

["Received about January 24 or 25, 1918.]

"Duck Pond Plantation, Valley Station, Miss.—Gentlemen: I am writing you to see the possibility of buying

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and getting immediate possession of Duck Pond plantation.

"Now, I am writing you as I do not care to pay a real estate man thousands of dollars for an advertisement.

"We must have a place within the next ten days, before good weather sets in, and be on the place. Now we have an option on a good place, but we do not think it is large enough for us, and think that your place is about suitable.

"If you really want to sell and sell at once let me know at once by night letter your best price at my expense; also give me your best terms, as it all must be done at once, as I have no time to haggle over a price if it is suitable, and I think reasonable we can trade, but the first offer must be your best; also write me in a letter, location, amount of mules, feed as to hay and corn, houses, implements, barns, etc., and how many families you have contracted for the year.

"Now if you care to sell send me a sixty-day option by return mail, as it will insure us against loss by the time we are getting settled and our money matters straight and sell out up here.

"Write me, S. Lamensdorf, Gilmore, Ark.

"An immediate letter and telegram would probably put the deal through, as I have to confer with the men that are backing me and must have not less than sixty-day option to do so, although the decision will be reached in the next ten days, in fact by the 1st, and not later, so wire me by return mail at my expense your best terms and about the options.

"Yours truly, S. LAMENSDORF."

At the time Mr. Lamensdorf wrote these letters he was the bookkeeper of Nicholson Bros., who subsequently became the purchasers. The testimony shows that Lamensdorf wrote direct to Duck Pond plantation at the instance and request of his employer, Mr. Nicholson;

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that, in pursuance of the direct inquiry from appellee, Barbour and Coker sent appellee a telegram. Thereupon by a common understanding between Nicholson Bros. and appellee one of the Nicholsons came direct to Yazoo county and negotiated directly with Barbour and Coker, and subsequently closed the deal for the said property at a consideration of ninety thousand dollars. The property was listed with Agent Henry at one hundred and fifteen thousand dollars. When Nicholson came to Yazoo county personally to inspect the property he claimed to be acting for himself, and not through any agent whatever. He gave Barbour and Coker no intimation that Lamensdorf was an intermediary, and appellee himself at no time advised Barbour and Coker that he was acting as an agent until after the sale was made. After the negotiations were concluded appellee thereupon first demanded of Barbour and Coker his alleged commissions. He followed this demand up by also demanding of Agent Henry one-half of any commissions which Mr Henry was making out of the transaction. It appears that Mr. Claude Henry is closely related to Mr. Barbour, and after the deal was closed Barbour and Coker agreed to pay Claude Henry two thousand dollars, commissions and fifty dollars expenses. This amount of money they paid into court, and are no longer interested in the result of this litigation.

The chancellor awarded the complainant one-half of the two thousand dollars commission, and from this decree an appeal has been prosecuted, and any liability at all is challenged.

There is proof tending to show that Mr. Barbour asked Nicholson whether he learned of the property through Claude Henry and if he had had any negotiations with Claude Henry, and that Nicholson responded "that he had had no communication with Claude Henry as a real estate agent, or any other real estate agent, and stated that, if he had to deal through Claude Henry

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or any other real estate agent, he would not look at it;" furthermore, that Henry did not have the exclusive right to handle the property, but that the owners had reserved the right to negotiate a sale themselves. The testimony shows therefore, that the transaction was closed without any knowledge or intimation that any agent whatever had brought Nicholson to the owners or that any agent would claim any commissions.

Appellee, as a witness in his own behalf, was asked the following questions, and testified in response thereto as follows on direct examination:

"Q. You were working for Nicholson Bros. when this transaction was first instituted and when it was closed, were you? A. Yes, sir.

"Q. As a bookeeper? A. Yes, sir."

And on cross-examinaton:

"A. I wrote the first letter asking for an option at the dictation of Mr. Nicholson, whom I worked for.

"Q. To get a reduction in price? A. He said that he didn't think he could pay that much for the place, and wanted to get it as low as possible.

"Q. You say you were working for Nicholson? A. Yes, sir.

"Q. This was an arrangement of Nicholson to get a reduction on the purchase price of Duck Pond? A. He was after getting the place as low as possible."

The admissions of appellee are conclusive on the proposition that he acted for the purchaser. There is some force in the argument that appellee brought the purchaser to Barbour and Coker and effected the sale that Agent Henry knew nothing of the negotiations, and was not responsible for the consummation of the trade; that, while Agent Henry may not have been in position to enforce any legal claim for commissions, yet, having received a commission of two thousand dollars, by an amicable settlement with Barbour and Coker, he has accepted the fruits of Lamensdorf's efforts.

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We do not believe these considerations are controlling. The whole claim of appellee is bottomed upon an alleged subagency. The testimony shows conclusively that appellee did not accept Claude Henry's proposition to act as a sub-agent for Henry, but, on the contrary, repudiated Henry's offer and elected to represent Nicholson Bros. in an effort to buy the property at a price much lower than the list price. At the instance and request of Nicholson Bros., appellee negotiated direct with the owners, and in these negotiations he was not speaking and acting either for Henry or Barbour and Coker, but solely for and on behalf of the prospective purchasers. He never at any time intimated either to Henry or Barbour and Coker that he was representing the vendors. On the contrary, he conspired with Nicholson Bros. to buy the property at the lowest price possible. He manifestly elected to save for Nicholson Bros. a part of the price desired and fixed by the owners, and not to realize the full amount of the list price for the owners and take his *pro rata* share of the commissions. This being so, he did not in fact act as a sub-agent of Henry, but solely as the agent of the purchasers. On the law and facts, therefore, we conclude that the chancellor was clearly wrong, and that the decree appealed from should be reversed.

We are not to be understood as holding that a real estate broker cannot appoint a sub-agent to assist him in his work, or that a real estate broker, who is given no discretion by the vendor, may not sometimes act as agent for both vendor and purchaser. Such a case is not now presented. It appears affirmatively that Barbour and Coker originally listed the property with their agent at a much higher price than they ultimately received but reserving to themselves the right to make a sale. It furthermore affirmatively appears that they in fact negotiated with Nicholson in good faith without actual knowledge that anyone was claiming a commis-

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sion. Mr. Henry is a blood relative of Mr. Barbour one of the owners, and received two thousand dollars for his services in advertising and attempting to effectuate a sale and under circumstances that rendered his claim a doubtful legal demand. It does not follow that, because Barbour and Coker have paid Henry a gratuity, appellee is entitled to recover. He must recover upon the strength of his own demands.

The decree of the learned chancellor will be reversed, and a decree rendered here in favor of appellant.

Reversed, and decree here.

GULF TRANSP. Co. v. FIREMANS FUND INS. Co.

[83 South. 730, In Banc. No. 20934.]

1. INSURANCE. *Loss of oil barge not covered by marine policy against "perils of the sea."*

Where an oil barge while being towed in smooth waters within thirty minutes after starting on the voyage broke under the weight of her own cargo, necessitating stranding, on account of initial defective construction, though it had been repaired by the insurer after a previous storm, was not covered by a policy against perils of the sea, barratry, etc., the loss in such case not being proximately caused by a "peril of the sea."

2. APPEAL AND ERROR. *Court will not reverse chancellor unless findings are clearly wrong.*

The supreme court on appeal should not reverse the findings of a chancellor on facts unless he is clearly wrong.

APPEAL from the chancery court of Harrison county. HON. WM. M. DENNY, JR., Chancellor.

Suit by the Fireman's Fund Insurance Company against the Gulf Transportation Company. From a decree for the defendant for less than it claims against plaintiff, it appeals.

The facts are fully stated in the opinion of the court.

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J. A. Leathers and *Mize & Mize,* for appellant.

White & Ford and *Dart, Kernan & Dart,* for appellee.

STEVENS, J., delivered the opinion of the court.

Appellant, a Mississippi corporation had constructed and is the owner of a certain wooden barge "Bert." This barge was constructed at Gulfport, Miss., in 1916, and on August 2, 1916, appellee, the Fireman's Fund Insurance Company, a foreign corporation of San Franciso, Cal., executed a time policy of marine insurance whereby it undertook to insure the said Gulf Transportation Company for a period of one year, and in the sum of thirty-five thousand dollars, against any loss or damage to said barge caused by the perils of the sea as named and set forth in the written contract. The perils, accidents or contingencies insured against are set forth in the following clause:

"Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, fire, barratry of the master (unless the insured be an owner of the vessel), and of the mariners and all other losses and misfortunes which have or shall come to the damage of the said property or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston, subject to the provisions or conditions referred to by clauses in this policy."

The barge was constructed for the transportation of oil, and soon after it was constructed and the policy of insurance written, it was towed from Gulfport to Tampico, Mex., where it was used in carrying oil from Tampico to Lobos Island, making several trips. In February, 1917, it started upon a voyage from Tampico to New Orleans, La., in tow of a tug. On this voyage it encountered a storm which badly water-logged and

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otherwise damaged the barge to such an extent that it was compelled to put into the port of Galveston for repairs. Thereupon appellee company appointed one T. J. Anderson, a ship surveyor, to make a survey and report to the insurance company. Mr. A. E. Fant appears to be the principal owner, the active agent, and dominant influence in appellant company. Mr. Fant went to Galveston to look after the interest of his company and there received from Anderson, the surveyor, recommendations as to what should be done to repair the damage to the barge. Without referring to immaterial conflicts in the testimony, it may be said generally that these negotiations between Fant and Anderson led to the preparation by Mr. Anderson of plans and specifications for the necessary repairs, and that, based upon these specifications, Fant, acting for the Gulf Transportation Company, contracted with one Weaver to repair or rebuild the barge in accordance with Anderson's specifications. In the course of the work, Fant made payment to Weaver on the contract in accordance with the O. K. or recommendation of Mr. Anderson. The total expense of these repairs appears to have been twenty thousand, five hundred four dollars, and fifty-four cents, and under the terms of the policy appellant claimed and recovered sixteen thousand, nine hundred, sixty-four dollars and twenty-one cents as the amount for which the Insurance Company was chargeable. Weaver completed his contract, and thereupon Anderson, at Mr. Fant's request, gave a certificate of seaworthiness, upon which Frank B. Hall & Company, the New York agents of appellee company, reinstated the policy for the full amount of thirty-five thousand dollars; the additional premium to be paid when appellee settled for the loss incurred as above stated Mr. Fant thereupon leased the barge, as repaired, to Charles Clark & Co., which company had the barge towed up Houston Ship Channel to Lynchburg, Tex., where she was loaded

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with oil and proceeded on a voyage down Houston Ship Channel to Port Arthur, Tex. After going a short distance, about thirty minutes after she started, and while in smooth and placid waters, she gradually began to settle, the oil began to seep out of the barge and make its appearance in the wake of the barge, and to prevent further sinking the captain "shoved her out of the channel in shallow water and anchored the barge and then proceeded to Galveston light to report." The captain left the barge anchored over night and, returning the next morning, states: "She was resting on the bottom in about twelve feet of water." That he thereupon "pumped water out of her and she floated, and we got back in the channel and carried her back to Lynchburg."

The parties failed to adjust or agree upon the loss or amount properly chargeable under the terms of the policy, whereupon the Gulf Transportation Company instituted a suit on the policy in the circuit court of Harrison county for the recovery, first, of the sum of sixteen thousand, nine hundred, sixty-four dollars, and twenty-one cents under the first loss; and for the sum of thirty-five thousand dollars, alleged total loss for accident in Houston Ship Channel. It was the contention of the plaintiff that the barge opened up, became hogged, and so badly went to pieces in Houston Ship Channel that she is no longer fit for the purpose for which she was constructed, and that inasmuch as, under certain estimates obtained by appellant, it would require at least forty thousand dollars to make the barge seaworthy, she is now a total loss. The barge at the time this suit was instituted, and at the time it was tried in the lower court, was anchored at Galveston, and a photograph of the barge as she lies at anchor is made a part of the record. Because the case was tried in the circuit court, appellee filed its bill in the chancery court of Harrison county to enjoin the prosecution of

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the suit at law, and seeking to transfer the issues to a court of equity for reasons unnecessary here to set out. To this bill appellant, as plaintiff in the action at law, filed an answer and cross-bill and consented to equity jurisdiction. The pleadings were thereupon drawn in accordance with the practice in chancery, and the cause submitted to the chancellor upon the pleadings and proof, and a decree rendered awarding to appellant the full amount of sixteen thousand, nine hundred, sixty-four dollars, and twenty-one cents, together with interest thereon, as the appropriate amount of loss incurred as a result of the storm and as a consequence of the repairs made by Weaver, but denied any recovery on account of the alleged second disaster in the Houston Ship Channel. Appellant company was satisfied with the recovery awarded for the first loss and elects to accept the amount found to be due for the first disaster, but prosecutes its appeal from that portion of the decree denying the claim of thirty-five thousand dollars, on the policy as restored for the loss alleged to have been sustained in the Houston Ship Channel. The only issue presented by this appeal, therefore, is the question whether or not appellant is entitled to recover damages claimed to have been sustained on the last voyage.

On the question of liability two main contentions are made by counsel for appellant: First, that the repairs at Galveston were under the direct supervision of T. J. Anderson a surveyor for the insurance company; that Anderson as a surveyor for appellee company issued a certificate of seaworthiness; that acting upon this certificate of seaworthiness, the insurance company restored the policy for the full amount, and the barge started upon the journey which resulted in disaster; and that the insurance company is accordingly estopped from pleading or successfully maintaining that the barge was not seaworthy. Second,

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that the gradual settling or threatened sinking of the barge, which the captain prevented by anchoring in shallow water, was a peril of the sea contemplated and covered by the terms of the policy. Much is said in the bill of complaint and the cross-bill as to the authority of Mr. Anderson, the surveyor, and the alleged fraud of Mr. Fant in procuring the certificate of seaworthiness from Anderson; but the lengthy averments on these points have little or no bearing on the point discussed in this opinion. Complainant is likewise made that the barge went to pieces on July 7, 1917, and appellant did not give formal notice of abandonment until January 26, 1918. There was no cross-appeal by appellee company from that portion of the decree awarding damages for the first loss. There is an express warranty of seaworthiness, and upon this written clause of the policy appellee relies. Appellee furthermore contends that the proximate cause of the damage alleged to have been sustained on July 7, 1917, was not one or more of the perils which appellee company agreed to bear. In reference to the proximate cause of the damage there is evidence tending to show that the barge was structurally weak and not suited for the purposes for which she was built; that the new work done by Mr. Weaver, the contractor, in Galveston, gave way when the barge was loaded and started on the voyage down Houston Ship Channel, and that "she broke under the weight of her cargo;" that in Houston Ship Channel the water was smooth and placid; there was no collision, no obstructions, and no negligence on the part of the master of the crew; that the barge became hogged and water-logged as a result both of structural weakness and the fact that the repairs were not properly made; that there were not sufficient longitudinal timbers to make her strong enough for the Gulf of Mexico trade; that the longitudinal bulkheads were halved into one another, and as a consequence

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thereof they do not furnish the strength that they should; and furthermore, that the contractor who originally constructed this barge has, since this accident, placed more longitudinal timbers in barges subsequently constructed under similar plans to avert an accident of the kind here complained of. We shall quote certain portions of this testimony in disposing of the one and only law point which, in our judgment, is decisive of this appeal.

Our view of the law as applied to the particular facts leads to an affirmance of the decree complained of. Aside from any other question in the case, and especially the question of estoppel so much relied upon, any loss occasioned by the last voyage in the Houston Ship Channel was not proximately caused by any of the perils insured against. Mr. Arnould, the leading authority on marine insurance, observes:

"*Causa proxima non remota spectatur is* a principle which is more rigorously applied to cases of marine insurance than to those of other liabilities."

Arnould on Marine Insurance (9th Ed.), par. 783. The loss or damages sued for is not the result of any violent action of wind or waves, a collision, or obstruction. It affirmatively appears that the barge on its last journey encountered no storm or rough weather, struck no rock or other obstacle, but on the contrary, while being towed in perfectly smooth and placid waters, and in thirty minutes after starting on the journey, broke under the weight of her own cargo. The testimony of Mr. Fant himself is conclusive on this point. He testifies that the original hogged and unfit condition of the barge was the result of the storm which he thought could be remedied "by building the bulkheads back up and down her, and putting in sheathing on the inside, 4x12 inside the frame to hold her back in her shape;" that this, he thought, would make her strong enough to go to sea. But continuing he says:

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"That would hold her when she was light; but after putting in a cargo these 4x12's were so strained that they gave way, I suppose, and, the fastenings being already once worked she hogged again with the first cargo."

Capt. Larche, the United States Inspector of Hulls, among other things, says:

"Since she went down the second time, I concluded that a great many of the fastenings had been broken and the new fastenings would not hold and she broke under the weight of her cargo."

Mr. Grant, a marine surveyor employed by appellant company after this second disaster, held a regular survey of the barge, and solemnly makes a report in which he certifies:

"After careful examination of the barge, I am of the opinion she is structurally weak and not suited for the purposes she was constructed for. . . . It was further ascertained that the longitudinal bulkheads were halved into one another. This method of construction practically takes all the strength out of the longitudinal bulkheads."

Mr. Walmsley, appellant's witness, says:

"The port stern was broken or damaged to such an extent that it is lower than the starboard side, and that condition would show the barge is not staunch and strong enough for carrying bulk cargo. It might be termed hogged, but I call it broken. Hogged in the barge would mean a bend about amidship whether up or down, but being on the corners I would call it broken. The weight of the oil caused this. Her condition shows that the barge was not staunch and strong enough for the purpose of carrying oil, . . . and that condition existed before the oil was loaded in the barge."

Both witnesses Haden and Collin testified as to structural weakness and lack of sufficient longitudinal timbers.

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It is elementary that we should not reverse the chancellor on the facts unless his findings are clearly or "manifestly" wrong. Appellant relies largely upon legal presumptions. It contends that appellee's agent supervised the repairs at Galveston and admitted that the barge was seaworthy for the last voyage, and on that account is not only estopped from relying upon the breach of warranty pleaded in this case, but is furthermore estopped from insisting that the barge settled or began to sink as the result of unseaworthiness. It may be conceded that in proper cases the insurance company can admit the seaworthiness of a vessel and be estopped from relying upon a promissory warranty of seaworthiness. But, if it be granted that appellee admitted the seaworthiness of the vessel at the commencement of the voyage down Houston Ship Channel, it does not follow that appellant is thereby entitled to recover under the policy. The loss complained of must be one within the terms of the policy. Certainly if the vessel broke under the weight of her own cargo, without encountering any perils of the sea, there can be no recovery. The testimony in the case justifies such a conclusion of the chancellor; and, so, any presumptions or conjectures must yield to the proof. It is not a case where a vessel sinks without any known cause. Competent surveyors have examined the barge since the last mishap and give their testimony as experts on the real efficient cause of the accident. Under this view, it is unnecessary to indulge in any presumptions in favor of seaworthiness, or as to the burden of proof on this point. Aside from the usual presumptions so much discussed in the briefs, there was no extraordinary circumstances of weather, wind, rocks, sand or any other fortuitous event which contributed in whole or in part to the loss complained of. It is not a case of stranding, and therefore a loss under the policy.

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Counsel for appellant cite Arnould on Marine Insurance (9th Ed.), par. 694, to the point that, if the ship starts seaworthy the underwriters are precluded of any defense based upon any alleged unseaworthy condition. The author is there discussing cases in which the underwriters on the face of the policy "allowed the vessel to be seaworthy for the voyage," and the effect of such a provision on a loss "caused remotely by the ship having become unseaworthy, but proximately by a peril insured against." Counsel have cited no case which does not require the loss to be "proximately caused" by one of the perils insured against. Surely the contract must govern the rights and obligations of the parties, and, as stated by counsel for appellee, "an insurance policy is not a promissory note." It is certainly not our purpose to define the term "perils of the sea," or to indicate all the losses comprehended by a policy of marine insurance. Our duty in the case at bar is to determine whether the misfortune is an extraordinary of fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy. Mr. Arnould, in paragraph 812, quotes from Lord Herschell as follows:

"There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

And, further:

"Rule 7 of the Rules for Construction of Policy in the First Schedule of the Marine Insurance Act, 1906, declares that 'the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.'"

In Amer. & Eng. Ency. of Law (2d. Ed.), vol. 19, p. 1023, it is said:

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"In considering what is and what is not a peril of the sea the question is whether the loss arose from injury from without or from weakness within."

In the case of *Sassoon & Co.* v. *Western Assurance Co.* (England) reported in Ann. Cas. 1912D, p. 1037, is appears that the leak through which sea water percolated was wholly due to the rotten hulk. Lord MERSEY observes:

"There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea."

The contention that the underwriters are estopped to deny that the barge was seaworthy presents a more debatable question, and one which, under our view of the vital and controlling issue, it is unnecessary to decide. In the opinion of the writer there is much difficulty in the way of applying the doctrine of estoppel in this case. It is in evidence that not only Anderson but that Capt. Larche approved the original specifications for the repairs, and that both Anderson and Fant believed the barge would be seaworthy when the contractor, Weaver, had done the work in accordance with these specifications. It affirmatively appears that both parties to the contract thought the barge would be seaworthy, and therefore it is not a case where the underwriters, with knowledge of the unseaworthy condition of the vessel, nevertheless admit that the vessel is seaworthy. How can appellee company waive a condition which it did not know to exist? Mr. Arnould, in paragraph 688, observes:

"Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with

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her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he subsequently can never be bound thereby."

But, as stated, it is unnecessary to decide whether there was a breach of the warranty in this case. It is significant that the very contractor who did the work was not used as a witness by either party, and there is evidence which tends to show that the repairs which Mr. Weaver did were not sufficiently substantial, and that the money paid to Weaver is a clear loss. This, under the issues, is appellant's misfortune.

On the law and the facts the decree of the learned chancellor must be affirmed.

Affirmed.

HINES, DIRECTOR GENERAL OF RAILROADS, v. McCULLERS.

[83 South. 734, In Banc. No. 20861.]

1. ACTION. *Action for death of wife and daughter in same accident may be joined.*

Causes of action in favor of the same plaintiff and against the same defendant, of the same nature, and subject to the same character of defense and judgment may be joined in one declaration, even though the pleas thereto may be different.

2. SAME.

The rights of action by the same plaintiff for the benefit of the same parties to recover damages for the death of plaintiff's wife and daughter in the same accident, under Laws 1914, chapter 214 (Hemingway's Code, section 501), are of the same nature and subject to the same character of defense and judgment and may be joined in one declaration.

3. DEATH. *Contributory negligence of beneficiary does not bar recovery.*

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An action under Laws 1914, chapter 214 (Hemingway's Code, sec. 501, permitting recovery for death in cases where the injured person could have maintained an action, is not defeated by the contributory negligence of one of the beneficiaries, even to the extent of that beneficiary's interest.

4. CONSTITUTIONAL LAW. *Contributory negligence rule may be changed by statute.*

Contributory negligence as a defense in an action for a tort is grounded on the common-law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified or abolished by statute.

5. RAILROADS. *Trial instructions on negligence erroneous under evidence as to negligence and causes of injury.*

An instruction as to the duty of a railroad company to maintain a highway crossing over its tracks in good condition was erroneous where the evidence did not show negligence in the maintainance of the crossing and did not contribute to the accident.

6. RAILROADS. *Trial. Instructions on duty to maintain warning sign erroneous under declaration and evidence as to cause of injury.*

In an action for death of a passenger in an automobile at a railroad crossing, an instruction that the failure to maintain the sign required by Code 1906, section 4050 (Hemingway's Code, section 6674), was negligence, was erroneous, where such negligence was not alleged in the declaration, and the driver of the automobile testified that she knew of the crossing and looked for an approaching train.

7. TRIAL. *Instructions should confine negligence authorizing recovery to negligence alleged.*

Where the declaration alleged negligence in the maintainance of the crossing and the operation of the train, instructions allowing recovery, if the railroad was negligent in any respect that approximately caused the accident were erroneous.

8. TRIAL. *Instructions confining negligence to that alleged does not cure instructions permitting recovery for negligence not contributory to injury.*

Giving a requested instruction to find for defendant unless the jury found it negligent for failing to ring the bell did not cure the error of instructions permitting recovery for any negligence contributing to the injury, especially those permitting recovery for acts of negligence, which the evidence showed did not contribute to the accident.

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9. RAILROADS. *Prima-facie statute does not relieve plaintiff of final burden.*

Laws 1912, chapter 215, Hemingway's Code, section 1645), making accidents caused by running trains prima facie evidence of negligence, merely places on the railroad company the burden of introducing evidence as to the operation of its trains and showing the circumstances surrounding the infliction of the injury and after such evidence has been introduced, the burden then remains with the plaintiff to establish negligence by a preponderance of the evidence.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, JR., Judge.

Suit by J. F. McCullers against Walker D. Hines as Director General of Railroads. From a judgment for the plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

D. A. Scott, Earl Brewer, A. W. Shands, Chas. N. Burch and *H. D. Minor*, for appellant.

Maynard & Fitzgerald, J. W. Cutrer and *Sam C. Cook, Jr.*, for appellee.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a judgment awarding the appellee damages for the death of two persons alleged to have been killed because of the negligence of the servants of the appellant. At Matson, Coahoma county, Miss., the track of the Yazoo & Mississippi Valley Railroad Company runs approximately north and south, and a public road runs parallel therewith on the west side thereof and crosses at right angles to the east side of the track one thousand six hundred and seventy-six feet north of Matson station. The distance from the railroad track to this public road on the west side thereof is from fifty-five to sixty-five feet, and at the

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crossing the railroad embankment is about five feet high. The view between the railroad track and the public road is unobstructed from the station to the crossing. On the afternoon of the 9th day of April, 1918, an automobile driven by Miss Beatrice McCullers was proceeding from Clarksdale over this public road to the McCullers residence, three or four miles north of Matson. In this automobile, in addition to Beatrice McCullers, were her mother, Mrs. McCullers, her sister, Francis McCullers, a Miss Stephens, and a negro nurse. As they were crossing the railroad track the automobile was struck by the engine of one of the appellant's passenger trains going north, and all of the occupants thereof except Beatrice were killed. The McCullers family consisted of John McCullers, the husband and father, Mrs. McCullers, the wife and mother, and three daughters, Beatrice, Sydney, and Francis. This action is prosecuted by John McCullers under chapter 214, Laws of 1914 (Hemingway's Code, section 501), under which any damages he may recover will enure to the benefit of himself and his two children Beatrice and Sydney. The cause was submitted to a jury, which rendered a verdict in favor of the plaintiff for sixty thousand dollars, and there was a judgment accordingly.

The negligence with which the appellant is charged in the declaration is: First, in the maintenance of the crossing; and, second, in the operation of its train at the time of the accident. One of the appellant's contentions in the court below was that this road on which the deceased persons were traveling at the time they were killed was not a public one, but the evidence relative thereto was conflicting. The evidence with reference to the condition of the crossing was that it "had been washed off; the embankment on each side had been washed off right smart, and it was narrow, . . . it was a pretty steep grade, . . .

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and it would take pretty good speed to get up." Beatrice stated that "it was kind of steep, and the crossing was rough because it had been washed out along there; it had not been kept up any too particularly well; not any of the roads as far as that is concerned." And, on being asked whether the crossing was "kept up as well as the roads are," she replied, "No; and that is not saying very much, and the crossing is very narrow, and I had to put all of my time to handling the car, because it was very long and it was very heavy going up that curve, and it occupied all my time." According to the testimony of the appellant, which included several photographs of the crossing, the crossing was maintained in good condition. The engineer of the appellant's train testified that he was on the lookout when approaching the crossing, but did not see the automobile and was not aware of its presence until he felt the engine strike it. The engineer's seat is on the right side of the engine cab, and his view to the left is obstructed by the boiler of the engine to such an extent that he could not see the rail on his left for a distance of forty feet in front of the engine, and he could not see the point where the road turns to cross the track after he came within five hundred and twenty feet of the crossing.

The fireman was engaged in putting coal in the engine's furnace as the train approached the crossing, and did not see the automobile until after it was struck.

The whistle of the engine was blown just before the train reached Matson, which station the train passed without stopping, and the engineer and fireman testified (section 4045, Code of 1906; Hemingway's Code, section 6669), that the bell of the engine was rung continuously for more than three hundred yards as it approached the crossing, as did several other witnesses who saw the train as it passed. Other wit-

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nesses, however, testified that they saw the train as it passed, but that the bell was not rung. The train when it passed Matson was about ten minutes late. Beatrice McCullers was skilled chauffeur thoroughly familiar with this public road, the railroad crossing, the time this train was scheduled to pass Matson, that it had not passed and was then overdue. The road was dusty, a wind was blowing, and all of the curtains of the automobile were up. Beatrice testified that when about two hundred and fifty or three hundred yards from the crossing she looked back down the track to see if the train was approaching, did not see it, that when she reached the crossing she drove on the track without stopping, and simply "glanced once just for a fraction of a minute" through the isinglass of the curtains down the track before driving upon it, but that the dust was very bad and obstructed her view so that she could not see very far, and that she did not see the train. The train was running about forty miles an hour when it reached the crossing, and the automobile before reaching the crossing was running about fifteen miles an hour, but when it turned to go on the track its speed was reduced to from six to ten miles an hour. The automobile was the property of Beatrice McCullers, who was then nineteen years old.

One of the appellant's pleas was to the effect that there was a misjoiner of causes of action, to wit, one for the death of Mrs. McCullers, and the other for the death of Francis McCullers. This plea on motion of the appellee was stricken out. No point is made on this method of disposing of the plea.

The assignments of error bring under review, among other things: (1) The alleged misjoinder of cause of action; (2)the refusal of the appellant's request for an instruction peremptorily charging the jury to return a verdict in his favor; (3) The refusal of the appellant's request for an instruction charging the jury not to award

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a recovery of any damages that would enure to the benefit of Beatrice McCullers; (4) the refusal of the appellant's request for an instruction charging the jury not to award any damages for the death of Francis McCullers; (5) the granting of the appellee's instruction Nos. 3, 7, 14, 16, 18, 19, 20 and 23; (6) the amount of the verdict. The questions thereby raised will be considered in their order.

First. Causes of action in favor of the same plaintiff and against the same defendant, of the same nature, and subject to the same character of defense and judgment may be joined in one declaration, even though the pleas thereto may be different. Andrew Stevens, Pleadings, 356; 1 C. J. 1067; *Railroad Co.* v. *Hirsch,* 69 Miss. 127, 13 So. 244. It is true that this rule is subject to the qualification "that the causes of action must be in the same right." For example, a person cannot join in the same action a cause of action accruing to him individually to one accruing to him in a representative capacity. *McVey* v. *Railroad Co.* 73 Miss. 487, 19 So. 209. But such is not the case here for the cause of action sued on each accrued to the plaintiff in the same right by virtue of chapter 214, Laws of 1914 (Hemingway's Code, section, 501).

Second. One of the appellant's contentions is, and we will assume, that Beatrice McCullers failed to exercise due care to ascertain whether or not a train was approaching before she drove on the railroad track and consequently was guilty of negligence which contributed to the killing of her mother and sister. Another of its contentions, the evidence in support of which it will be unnecessary for us to set forth, is that Beatrice was driving the automobile as her father's agent.

The grounds upon which the appellant requested that a verdict be directed in his favor, as set forth in the brief of his counsel, are:

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Beatrice, being guilty of contributory negligence as a matter of law and being a jont tort-feasor, cannot recover as a beneficiary by reason of two deaths, and as the right to sue on account of the death is a joint right, and not a joint and several right, Beatrice being, barred all other beneficiaries are barred. (b) The gross contributory negligence of Beatrice is imputed to her father for whom she was acting as agent, and bars recovery both by the father and by Beatrice, and also by Sydney, for whom the father was acting by virtue of the family relation."

The right of the appellant to maintain this action is conferred and measured by chapter 214, Laws of 1914 (Hemingway's Code, 501), and the sole test therein contained of the right to maintain such an action is the right of the person injured to have maintained an action therefor had death not ensued. *Kirkpatrick* v. *Ferguson-Palmer Co.*, 116 Miss. 874, 77 So. 803. Had Mrs. or Francis McCullers lived and sought themselves to recover of this appellant the negligence of Beatrice which may have contributed to their injury would not have barred their recovery (20 R. C. L. 158; *Railroad Co.* v. *Davis*, 69 Miss. 444, 13 So. 693; *Railroad Co.* v. *McLeod*, 78 Miss. 334, 29 So. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630); consequently her contributory negligence cannot avail the appellant here (*McKay* v. *Syracuse Ry. Co.*, 208 N. Y. 359, 101 N. E. 885; *Braun* v. *Buffalo General Elec. Co.*, 213 N. Y. 655, 107 N. E. 338; *Southern Ry. Co.* v. *Shipp*, 169 Ala. 327, 53 So. 150; *Wymore* v. *Mahaska Co.*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; *Wilmot* v. *McPadden*, 78 Conn. 276, 61 Atl. 1069; *Watson* v. *Southern Ry. Co.*, 66 S. C. 47, 44 S. E. 375).

Contributory negligence as a defense in an action for a tort is grounded on the common-law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified

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or abolished by statute (*Bowershock* v. *Smith,* 243 U. S. 29, 37 Sup. Ct. 371, 61 L. Ed. 572; Arizona Employers Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058; *Chicago, R. I. & Pac. Ry. Co.* v. *Cole,* 250 U. S. 54, 40 Sup. Ct. 68, 64 L. Ed. —), and that is what the statute here under consideration has done in so far as the contributory negligence of the persons benefited thereby is concerned.

The peremptory instruction was properly refused.

Third. For the same reason the instruction that no recovery could be had for the benefit of Beatrice was also properly refused.

Fourth. The first ground on which the appellant seeks to sustain his request for an instruction charging the jury not to award a recovery for the death of Francis is the contributory negligence of Beatrice, which has been disposed of in what we have heretofore said in discussing his request for the general charge. The second ground upon which this request is sought to be sustained is similar to the first, is governed by the same rule, and is that Francis, who was four years old, had been confided by her father on the occasion in question to the care of Mrs. McCullers; that Mrs. McCullers was negligent in permitting Beatrice to drive onto the crossing without ascertaining whether a train was approaching, which negligence must be imputed to the father and the other beneficiaries herein. The instruction was properly refused.

What we have hereinbefore said with reference to the effect of the contributory negligence of Beatrice upon the right of the appellee to recover will also dispose of other contentions of the appellant, not herein specifically referred to which are grounded thereon.

Fifth. The appellee's instruction No. 16 is as follows:

"The court instructs the jury that, if you believe from the evidence that the crossing in question was a highway, under the law in Mississippi it was the duty

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of the defendant to make proper and easy grades in the highway at which the deceased were killed, so that the railroad might there be conveniently crossed, and to keep such highway in good order, and if the jury believes from the evidence that the defendant did not comply with this duty imposed upon it by the law in any respect, then such conduct on the part of the defendant was negligence, and if they believe that such negligence in any way or to any extent contributed to bring about the death of the deceased, then they will find for the plaintiff."

The appellant's duty to keep the crossing in good order was also set forth in the appellee's third and fourteenth instructions. These instructions should not have been given for two reasons: First, the evidence will not justify a finding that the appellant was negligent in the maintenance of the crossing; and, second, if it was negligent with reference thereto it is manifest from the evidence that the condition of the crossing in no way contributed to the accident.

Instruction No. 19 is as follows:

"The court instructs the jury that, if they believe from the evidence the crossing in question was a highway, it was the duty of the defendant to cause a board to be erected and kept upon a post or frame, sufficiently high, at the highway where the deceased mother and daughter were killed, with this inscription thereon, 'Look out for the Locomotive,' or this inscription, 'Railroad Crossing,' and that under the law the said defendant is made liable to any party injured by such failure or negligence for all damages he may have sustained thereby, if such failure or negligence was the proximate cause of the injury."

The duty of the appellant to place such a sign at the crossing was also set forth in the appellee's third instruction. It appears from the evidence that the appellant failed to maintain at this crossing a sign with the inscription thereon "Look out for the Locomo-

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tive" or "Railroad Crossing," as required by section 4050, Code of 1906 (section 6674, Hemingway's Code), and consequently, if the road was a public one, it was negligent in that respect. Nevertheless the instructions should not have been given: First, because the declaration does not count on any such act of negligence; and, second, it is manifest from the evidence that the absence of the sign in no way contributed to the accident. The purpose of the requirement that such a sign be placed at the intersection of a highway with a railroad track is to call the attention of travelers on the highway to the presence of the track and of the necessity of looking out for an approaching train. Beatrice was thoroughly familiar with this road and the railroad crossing, knew that she was about to cross the track, that the train was then over due, and in fact looked to see if it was approaching.

The negligence charged in the appellee's declaration and to which, under elementary rules of procedure, the jury should have been confined in their deliberation, is in the operation of the train and the maintenance of the crossing. There is nothing in the evidence to warrant a finding by the jury that the negligence in the maintenance of the crossing contributed to the striking of the automobile by the appellant's train, or that the appellant's engineer failed to keep a proper lookout; consequently the jury should have been confined on the question of negligence to determining whether or not the bell was rung while the engine was approaching the crossing, and not have been permitted, as they were by the appellee's seventh instruction, to find for the plaintiff "if you believe that the railroad company was negligent in any respect that proximately cause the killing;" by the fourteenth instruction if "the defendant was otherwise guilty of any intervening negligent act which operated to bring about the death of the deceased;" by the eighteenth unless "the defendant was

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free from all negligence of every character which contributed to bring about the injuries complained of in plaintiff's declaration;" by the twentieth unless "the whole proof satisfy the jury that the defendant was entirely free from negligence in killing them;" by the twenty-third in event "they were killed because of some negligent act of omission or commission by the defendant which was the proximate cause of, or which contributed to bringing about their death."

The error in these instructions, particularly in the sixteenth and nineteenth, was not cured by the granting of the appellant's twenty-third instruction, by which the jury were charged to "find for the defendant unless they . . . believed from the evidence that the defendant failed to ring the bell for three hundred yards before entering upon the crossing, and that this failure alone was the proximate cause of the injury."

The appellee's instructions Nos. 18 and 20 are as follows:

"(18) The court instructs the jury that, while the burden of proof is upon the plaintiff in this case to make out his case in order to entitle him to a verdict at the hands of the jury, this does not mean that the plaintiff must prove that the defendant was guilty of any negligence whatsoever which brought about or contributed to the death of Mrs. McCullers and her daughter John Francis McCullers. The law presumes that the defendant was guilty of negligence and negligently and wrongfully produced their death from the mere fact of their being killed by the operation of the engine No. 1949, and the jury will return a verdict for the plaintiff unless the defendant has explained all the facts and circumstances surrounding the killing, including evidence of the manner in which the defendant operated the said engine and train, and such facts satisfy the jury that the defendant was free from all negligence of every character which contributed to bring about the injuries com-

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plained of in plaintiff's declaration, and, unless the jury are so satisfied from the evidence that the defendant was free from all negligence in the killing of the deceased, then the jury will find a verdict for the plaintiff."

"(20) The court charges the jury that the fact that Mrs. Sidney Montroy McCullers, and her infant daughter, John Francis McCullers, were killed by the runing of the locomotive and train of the defendant, is prima-facie evidence of negligence on the part of the defendant, and they will find a verdict for the plaintiff, unless the whole proof satisfies the jury that the defendant was entirely free from negligence in killing them."

The appellee is not entitled to recover from the appellant unless the death of Mrs. and Francis McCullers was caused by the appellant's negligence, and the burden of proving this fact was on the appellee. Because of the provisions of chapter 215, Laws of 1912 (Hemingway's Code, section 1645), the appellee met this burden when he proved that Mrs. and Francis McCullers were killed by being struck by one of the appellant's engines, whereupon, in order to meet the presumption of negligence raised by the statute, it devolved upon the appellant to prove all of the facts and circumstances surrounding the infliction of the injury from which an inference of negligence *vel non* of the character counted on in the declaration could have been drawn, and in event it failed to prove these facts and circumstances, or the jury should have been unable for any reason to determine from the evidence what these facts and circumstances were, the presumption of negligence created by the statute would have prevailed, and the verdict should have been for the appellee. But it is not the law that, when the facts and circumstances of an injury have been explained by the defendant by evidence which the jury believe to be true, the jury must find for plaintiff unless such facts and circumstances "satisfy the jury that the defendant was free from all negligence . . . which

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contributed to the injury" or "unless the whole proof satisfies the jury that the defendant was entirely free from negligence." On the contrary, when the facts and circumstances have been proven, or have been found by the jury when the evidence relative thereto is conflicting, the presumption of negligence raised by the statute disappears, and the liability of the defendant must then be determined from the evidence, and the jury should find for the defendant, unless it appears from the evidence that he was guilty of negligence which caused the plaintiff's injury. This rule was reversed by the instruction here under consideration and a burden was thereby placed on the appellant, which, under the law, should have been borne by the appellee. Any extended discussion of this prima-facie statute would seem to be unnecessary, for the effect thereof has been fully set forth in numerous decisions of this court, particularly in *Railroad Co.* v. *Thornhill,* 106 Miss. 387, 63 So. 674, *Railroad Co.* v. *Daniell,* 108 Miss. 369, 66 So. 730, and *Railroad Co.* v. *Gray,* 118 Miss. 612, 79 So. 812.

Sixth. Since the judgment of the court below must be reversed because of the errors therein hereinbefore pointed out, it will not be necessary for us to determine whether or not the verdict is excessive.

Reversed and remanded.

COOK, J., dissents.

PETERS BRANCH INTERNATIONAL SHOE CO. v. GUNN.

[83 South. 742, In Banc No. 20948.]

1. FRAUDULENT CONVEYANCE. *Sale of stock of goods in violation of bulk sales law is void.*

A sale of a stock of goods in violation of the Bulk Sales Law is fraudulent and void.

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2. CREDITORS MAY RECOVER GOODS FRAUDULENTLY SOLD IN BULK OR HOLD THE BUYER FOR VALUE.

Where a stock of goods was sold in violation of the Bulk Sales Law, a creditor may proceed against the property if it remains in the hands of the purchaser, or waive the tort and sue the purchaser for the value of the goods or he may pursue both remedies.

3. FRAUDULENT CONVEYANCE. *Disposal by buyer of goods fraudulently sold in bulk does not affect his liability.*

The fact that the buyer of a stock of goods who had not complied with the Bulk Sales Law had disposed of them before the creditors' suit was filed, does not affect his liability for he stands in the position of a trustee of the property for the creditors.

4. FRAUDULENT CONVEYANCE. *Payment of proceeds of void sale in bulk to other creditors does not relieve buyer.*

The application by the seller of goods in violation of the Bulk Sales Law, of the proceeds of the sale to the payment of some of his creditors, does not affect the buyer's liability to a creditor who had not received any of the proceeds.

5. FRAUDULENT CONVEYANCE. *Existence of other creditors not made parties does not affect right of complainant creditor.*

A creditor may recover from the buyer of goods sold in violation of the Bulk Sales Law the full amount of his claim if it is less than the value of the goods, though there may be other creditors, not made parties to the suit, whose total claims greatly exceed the value of the goods.

APPEAL from the chancery court of Jones county.

HON. G. C. TANN, Chancellor.

Suit by the Peters Branch International Shoe Company against R. B. Gunn and H. P. Hurlbert. Decree for complainant against defendant Hurlbert, but in favor of defendant Gunn and complainant appeals.

The facts are fully stated in the opinion of the court.

Chambers & Trenholm, for appellant.

Appellant respectfully contends that it is entitled to a personal decree against appellee for the amount of its claim against the said Ewart & Hurlbert, with legal interest and all cost of the court, provided the

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amount of its claim, without interest or costs, does not exceed the reasonable value of the goods which it claims were fraudulently transferred by its debtors to appellee; or that it is entitled to a decree against appellee for the value of the goods remaining in appellee's hands at the time the answer was filed, with interest and costs, the value of said goods being less than appellant's claim; or that it is at least entitled to a decree against appellee for what would have been its *pro rata* share of the proceeds of said sale. Since the several grounds assigned as error tends to the same result, that is a decree in favor of appellant and against appellee for a sum of money, we will consider them together.

Chapter 100 of the Laws of 1908, as construed and applied by the decisions of this court renders absolutely void as to the creditors such sale as is here shown to have been made. There are two questions, therefore, for determination in this case.

(1) Is the creditor to be without remedy because the fraud has been consummated without his knowledge? (2) Will the payment of the proceeds of a fraudulent sale to one or more of seller's creditors relieve the purchaser of his duty under the act?

If the first question be answered in the negative, there will be the further question as to whether the creditor is entitled to recover the full amount of his claim provided it does not exceed the reasonable value of the goods; whether he will be limited to the value of the goods remaining in the possession of the purchaser; or whether he will be limited to his *pro rata* share of the value of the goods involved in fraudulent sale, having regard for all of the other debts of the seller.

The learned chancellor entertained the view that the creditor was entitled to the remedy sought in his case as a general proposition, thus answering in the negative, the first question for determination; but that the

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requirements of the Act had been met when the proceeds of the sale reached one or more of the creditors, thus answering the second question in the affirmative. We submit that he was right as to the first proposition, and wrong as to the second.

Taking up the first proposition: To hold that the creditors had no remedy because the fraud had been concealed until the goods had been resold by the purchaser, or so interminged with his own as to be beyond identification, woud be to permit the purchaser to profit by his wrong, a thing which will not under any circumstances be allowed by the courts of a civilized country. This proposition is too well settled to require the citation of any authority, as the contrary would disrupt society.

We have been unable to find a reported decision of this court where it was expressly held that the creditor could proceed in a court of equity, as in this case. However, in the case of *Zachery* v. *Meridian Fertilizer Factory*, No. 18343, this court, withut a written opinion affirmed a decree of the chancery courts of Leake County in favor of the Meridian Fertilizer Factory, the creditor and against Zachery, the purchaser. In a case exactly like the one at bar, with the exception that the purchaser alone was made the defendant to the bill, and no claim was made that the proceeds of the sale went to creditors. It is true the question raised in this case does not seem to have been raised in the Zachery case but a glance at the case of *Drug Company* v. *Manufacturing Company*, 113 Miss. 130, will show that this court raises such questions of its own motion. In that case this court held that the contract sued on was violative of the public policy, and that the plaintiff could not recover, notwithstanding defendant admitted the contract to be legal. The court very properly said that regardless of the wishes of litigants, it would not allow a recovery unless there was a legal right. Apply that rule to the Zachery

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case. If the Fertilizer Company had no legal right to obtain a personal decree against Zachery in such a proceeding the supreme court should (and would) have of its own motion, denied a recovery, regardless of whether that specific question was raised or not.

If a creditor is not allowed to be allowed to pursue one whom the law had defined to be a fraudulent purchaser, simply because the fraud has been concealed so long that the goods have been placed beyond the reach of the creditors through the aid of a court of law, the main object of the Bulk Sales Law will have been circumvented.

Now if a court of law will avail the creditor nothing, will not a court of equity, which proceeds upon the theory that for every right there is a remedy (*Mobile, etc.*, v. *Davis*, 62 Miss. 271) be the only and the proper place to turn in such an emergency, one may ask upon what theory the court could hold the purchaser liable in such a case. We answer, upon the theory that he is a trustee in his own wrong for the benefit of the creditors, in that he has become the possessor of the goods through a fraud upon such creditors, and such goods were what the creditors were relying upon, so far as they might go, for the satisfaction of their claims. At all events such goods were liable at the suit of the creditors, until they had been sold in ordinary course of trade and in the case at bar the sellers being partners, could not even claim exemptions out of such partnership asset, under well known decisions of this court. Therefore if the purchaser, by his own improper act, places these goods beyond the reach of the creditors, and if he be not allowed to profit by his own wrong he must be held accountable as a trustee. That the court of equity is the proper place to compel an accounting by a trustee, there can be no question.

The statute and decisions make transactions like the one here under consideration *prima-facie* fraudulent and void, and if this *prima-facie* case is not overcome and

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it was not overcome here, the fraud alleged and proven is absolute grounds for equity jurisdiction. We say, therefore, that regardless of a remedy at law, the creditor has a remedy in equity, and that the chancery court, if not the only forum, is proper forum for the determination of such a controversy.

As to the purchaser being a trustee for the creditors, we find that such a theory is supported by a number of states for the purpose of enforcing liability for the violation of similar Bulk Sales Law, in the state of Washington, under a similar Bulk Sales Law, with no direct trustee provision, the court of last resort held: "We also think that the object of this law was to hold the goods of debtor under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors." There was no dissenting opinion. *Fitz Henry* v. *Munter* (Wash.), 74 Pacific, 1003; *Owoso Carriage Co.* v. *Sweet* (Texas), 179 S. W. 257. This case was approved by the Texas court of civil appeals in November, 1916, in the case of *Mercantile Co.* v. *Huges* (Texas), 189 S. W. Rep. 784; *Rubber Company* v. *Kaufman* (Neb.), 153 N. W. Rep. 585.

In another Nebraska case the court held: "One who obtains possession of a stock of merchandise in bulk in violation of the statute will be held to be a trustee for the benefit of the creditors of his vendor. *Mercantile Co.* v. *Barker* (Neb.), 138 N. W. Rep. 1133; *Kohn* v. *Fishbach* (Wash.), 78 Pacific, 199; *Tinsley* v. *Warehouse Co.* (Ga.), 64 S. E. Rep. 82; *Post* v. *Bird* (Florida), 9 So. Rep. 889.

We respectfully submit, therefore, that under the decisions cited, and under the practice in this state, a direct suit in chancery, by the creditor against the purchaser, affords the proper remedy in a case like the one at bar, and that the chancellor was correct in that the first proposition should be answered in the negative.

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If such a remedy is allowed, then arises the question as to the extent of the recovery. The appellee objects to a decree against him to the full amount of appellant's claim, because he may be proceeded against by other creditors. Our reply to that is, that he can be proceeded against only to the extent of the value of the goods he received. His answer to another creditor's bill would be the same as the answer of a garnishee to a second garnishment, he has satisfied the demand against him in a prior proceeding. Suppose this was a direct garnishment proceeding such as sued in some of the other states mentioned? Could Gunn escape on the ground that some other creditor of Ewart & Hurlbert may garnish him later on. No. If the other creditor be too late it is not the fault of Gunn but the creditor. Equity aids the vigilant, not those who sleep on their rights. *Newman* v. *Morris,* 52 Miss. 402.

Furthermore, if such a matter be allowed to proceed in equity, other creditors may intervene and share *pro rata* up to the time of the distribution of the fund, and not be cut off upon the filing of a garnishment proceeding. This is more just to the other creditors then the judgment and garnishment method.

Hence the complainant in this case unless other creditors intervene, is entitled to so much of the value of the goods as may be necessary to satisfy his claim, with interest and costs the complainant established its claim against Hurlbert, and the purchaser admitted that the sale was not made in compliance with the statute. The statute does not require that all creditors join to defeat the sale, as such a requirement would be foolish. Those who do not desire to enforce their rights should not be compelled to do so; neither should those who did so desire suffer because others abandoned their claims.

To hold that the purchaser should not be compelled to answer except to the extent of the proportionate part

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of the value of the goods as the creditor's claim bore to the total debts of the seller, would be to permit the purchaser to escape the penalty of his own wrong because some of the creditors, for some reason, did not pursue him; and to compel the diligent creditors to suffer to the benefit of the fraudulent purchaser because some other of the creditors were negligent or indifferent. Clearly the creditor will not be limited in his recovery to the value of the goods remaining in the hands of the purchaser when he is attacked. For these reasons we think the appellant is entitled to a decree against the appellee for the full amount of its claim, with interest and costs.

If the court agrees with us so far, there then follows the second proposition, that is to say, whether the purchaser is liable even though the purchase money has been paid to one or more of the creditors of the seller. We contend that to allow the purchaser to escape upon such a ground would be to defeat the very purpose of the law, of course, should the purchaser see that the purchase price (being the reasonable value of the goods) reached some one or more of the seller's creditors, the seller would be there prevented from personal profit by pocketing the money, but this act was not passed simply for the purpose of preventing a dishonest merchant from defrauding his creditors; it was and is intended to go very much further. By requiring notice a number of days in advance, stating the value of goods, the amount to be paid therefor, and the name of the purchaser, such notice to be given to every creditor which the seller might name in answer to the demand, or which the purchaser might discover by the exercise of reasonable diligence, the legislature clearly intended that every creditor should have an opportunity to protect himself in such manner as he might desire, or as the law might afford, to the end that all of the creditors should enjoy alike the proceeds of such sale. In other

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words, to give the creditors an opportunity, in case such action were necessary, as where all the assets were being disposed of for a sum less than the total debts a case of insolvency, to obtain the aid of a court of bankruptcy or of a court of equity, where the rights of all parties might be protected. And whereby the purchaser would be equally protected, for in no way could he be thereafter compelled to pay a second time. To allow the purchaser to escape because the proceeds of sale had been paid to some of the creditors would be to establish a method by which the laws prohibiting preferential transfers might successfully be evaded.

If the remedy which the appellant seeks in this case should be denied, or if the defense of payment of the proceeds of the sale to some of the seller's creditors should prevail then the Bulk Sales Law of Mississippi, the law fostered by the very men who sell the goods to the merchants and who thoroughly appreciated the need, will have been enacted almost in vain.

We respectfully submit, therefore, that the appellee, the purchaser in this case, innocent of intentional wrong though he may be, should be held liable notwithstanding the fact that the purchase money went to some of the creditors; and that he should be held liable for the full amount of appellant's claim, with interest and all costs; and that as the amount may easily be computed from definite figures upon the face of the record, the decree of "the learned court below," in so far as it dismissed the appellee, should be reversed and that a decree should be entered here in favor of the appellant, and against the appellee, for the amount sought to be covered, with interest, and the cost of court.

To hold otherwise would be to weaken, if not entirely destroy, what is recognized to be one of the fairest acts ever put upon the statute books by the legislature of this state, and open the door to frauds which would forever blacken the character of Mississippi in the eyes of the commercial world.

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J. C. Hannah, for appellee.

Appellant filed a bill in the chancery court for the purpose of recovering a personal decree against appellee on an indebtedness owing by Ewart & Hurlbert. Appellant did not represent or attempt to show that appellee ever contracted the debt, owed, or agreed to pay appellant a single, solitary cent. In fact, the record conclusively shows that appellee did not owe appellant anything whatever. Ewart & Hurlbert are the only ones that sustained any contractual relations to the appellant. The chancellor held that appellee was not liable to appellant and appellant comes to this court, seeking to have the decree reversd.

The only reason that counsel for appellant assigns for asking the court to hold appellee personally liable to appellant is his failure to comply with the Bulk Sales Law. It is admitted that the appellee in purchasing this stock of merchandise from Ewart & Hurlbert did not comply with this law, but I respectfully submit that there is nothing in the law that imposes a personal liability on this appellee for failing to comply with its provisions. Certainly this law as construed by this court in *Moore Dry Goods Co.* v. *Rowe,* 97 Miss. 775, 53 So. 626; 99 Miss 30, 54 So. 659; *Dean* v. *Bowes,* 110 Miss. 575, 70 So. 693, makes this sale absolutely void. However, the decisions of this court have not gone to the extent of rendering appellee personally liable to the creditors of one who disposes of his property under a fraudulent conveyance.

Learned counsel refer to the *percuriam* decision in case of *Zachery* v. *Meridian Factory.* Counsel, however frankly admit that the question involved in this case was not raised in said case and consequently was not decided.

Learned counsel inquires if the creditor is to be without remedy because, fraud is consummated without his knowledge, and proceeds at considerable length to dem-

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onstrate that the decision of the lower court in this case is erroneous by way of answer to this inquiry.

I respectfully submit in answer to this argument that there are numerous other remedies than the one pursued by appellant in this case. In fact, I submit that this is a most unusual procedure; and one that is certainly not contemplated or auhorized by the statute dealing with Bulk Sales.

I draw the court's attention to the fact that the only thing that appellant contends renders the appellee liable in this case is that Hurlbert made a fraudulent transfer of certain merchandise to appellee. The appellant was a creditor of Hurlbert's. He goes into the chancery court and asks for a personal decree against the purchaser of the merchandise, without even so much as showing that the seller thereof is insolvent or has not sufficent property to satisfy the demands of the appellant.

As above pointed out, our court in its former decision has held that a sale of merchandise in Bulk without a compliance with the provisions of the Bulk Sales Law is absolutely void. Justice SMITH in the case of *Moore Dry Goods Company* v. *Rome, supra,* rendered a dissenting opinion, holding such sales only *prima facie* void, and supporting his decision with numerous authorities. The views entertained by Justice SMITH as expressed in that case have been expressly approved by the supreme court of the state of Alabama in *Johnson Bros.* v. *Washburn,* 77 So. 461; *Hart* v. *Roney,* 93 Md. 432, 49 Atl. 66; *Williams* v. *Banks,* 15 Okl. 477, 83 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970; *Gilbert* v. *Gonyea,* 103 Miss. 459, 115 N. W. 640; *Fisher* v. *Herrmann,* 118 Wis. 428 95 N. W. 392; *Baumeister* v. *Fin,* 141 Ill. App. 372; *Sprintz* v. *Saxon,* 126 App. Div. 421, 110 N. Y. Supp. 585.

Appellee contends that the presumption of fraud arising in a transaction of this kind from a nonobservance of the provisions of the Bulk Sales Law can only be overcome by evidence tending to show compliance with

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the law. Some courts have given judicial sanction to this contention. *Moore* v. *Rowe,* 97 Miss. 775, 53 So. 626; *Moore* v. *Rowe,* 99 Miss. 30, 54 So. 659, Ann. Cas. 1913 c, 1213, being the principal authority favorable to appellant's contention. While we regret to have such distinguished precedent opposed to our conclusion, we are of the opinion that the weight of authority as well as sound reasons, is opposed to such holding, and that the dissenting opinions in the line of cases that support appellant's contention are sound expositions of the law. Authorities *supra.* If the construction urged by appellant is placed on the act in effect it becomes an act that absolutely invalidates, as being *per se* fraudulent, all sales made in want of conformity thereto. It has been declared by eminent authority that an act so arbitrary and drastic is unconstitutional. *Wright* v. *Hart,* 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, Ann. Cas. 263; *Off & Co.* v. *Moorehead,* 235 Ill. 40, 85 N. E. 264, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434.

The case at bar renders a striking illustration of the soundness of the views entertained by Justice SMITH. The record in this case shows that the seller represented the buyer that he owed seven hundred and fifty dollars or or eight hundred dollars in debt. That as soon as the stock of merchandise was sold and the money paid over that he was going to pay these debts; that the purchaser of the merchandise paid all that the merchandise was worth not only the money paid by the purchaser, but a great deal more, was actually paid to the creditors of the seller. That in fact here was no fraud whatever practiced, either by the buyer or the seller. Suppose as suggested in the authority last cited that the purchaser of this stock of merchandise had made demand on the seller as provided in the Bulk Sales Law for the names, addresses and amounts due each of his creditors, to which the seller had responded that he had no creditors and did not owe anything. That the purchaser, accepting said

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statement in good faith, had paid the purchase price to the seller, certainly the sale would not be fraudulent and void under such circumstances. Then why should it be void under the circumstances attending this particular transaction?

Learned counsel in their brief point out the holdings of some of the courts of the other states with reference to the liability of purchaser under the Bulk Sales Law. I respectfully submit that these authorities in reality have no bearing whatever on the case at bar. In the first place, the Bulk Sales Law as adopted by the respective states, is not at all uniform, some of these laws providing the remedies and others not. The decisions of the courts of last resort of the several states are likewise by no means uniform. As pointed out in learned counsel's brief some courts hold that the purchaser may be held liable as a trustee, while on the other hand many courts hold to the contrary. In the case of *McGreenery* v. *Murphy*, 76, N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.), 374, it is held that such sales are absolutely valid unless they are set aside by some creditor and that suit in equity will not lie. To this case there is an extended note.

If this court is to be persuaded or controlled by the decisions of other courts, I respectfully submit that it should approve the holding of Justice SMITH as contained in the dissenting opinion above referred to for the reasons expressed in *Johnston Bros.* v. *Washburn*, *supra*, wherein the court says "while we regret to have such distinguished precedent opposed to our conclusion, we are of the opinion that the weight of authority, as well as sound reason is opposed to such holding, and that the dissenting opinions in the lines of cases that support appellant's contention are sound expositions of the law. "In fact, the Bulk Sales Law, as adopted by the many states divided themselves into two general classes. One where the statute expressly declares the sale void; the other, where the law makes it presumptively void.

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The legislature of our state followed the latter course. I respectfully submit that in view of the two distinct courses that have been followed by the legislature in making these laws, that the decision of this court does not conform to the expressed contention of the legislature. In support of this theory, I direct the court's attention to the extended note to the case of *Everett Produce Co.* v. *Smith,* 2 L. R. A. (N. S.), pg. 331, and especially to paragraph 'e' of said note found on page 340, which is as follows: In *Hart* v. *Roney,* 93 Md. 432, Atl. 661, the statute construed (Md. Laws 1909, Chap. 579, p. 907) was very similar in most of its provisions to the Indiana Statute of 1901, but the sale was only presumed to be fraudulent and void. To the contention that the sale was fraudulent and void, because the parties failed to meet the requirements of the act the court replied: "we do not, however so construe the statute." It says such sale 'will be presumed to be fraudulent and void,' unless, etc."

The appellant complains because the chancery court did not award to appellant a personal decree against the appellee for the entire indebtness due appellant. Appellant's claim is for four hundred dollars. The facts show that the stock of merchandise purchased by appellee was worth only five hundred and sixty dollars. That he had already paid this amount. That this money has gone to the creditors of the seller. The record further shows that the total amount that was owing by the seller on his small stock of merchandise was some three thousand dollars.

As a matter of fact, if the seller and buyer of this stock of merchandise had complied with the Bulk Sales Law and the buyer had paid his money over to the seller at the expiration of five days, the seller could have done with this money exactly what he has done, namely, paid it to such of his creditors as he saw fit. If the value of this stock of merchandise has already been paid to the creditors, why should the purchaser be

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called upon to pay its value, or practically so, to this one creditor? If appellee could answer in another suit that he does not owe anything because he has paid to this creditor, why can't he answer in this case that he is not liable because his money has been paid to other creditors.

I respectfully submit that in truth and in fact this sale is not fraudulent and void and that this court should now approve the dissenting opinion in the case of *Moore Dry Goods Co.* v. *Rowe,* and I further submit that even if this court adheres to the rule as announced by the majority opinions in the former cases, that the decree of the chancery court is correct and proper because this appellee is not in any sense personally liable to appellant, and that this case should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellant, complainant, filed a bill in the chancery court of Jones county against H. P. Hurlbert and R. B. Gunn, alleging in substance that the defendant Hurlbert, while engaged in the mercantile business with his partner, became indebted to complainant for merchandise in the sum of four hundred, three dollars and thirty-five cents, which amount is past due and unpaid, and that Hurlbert and his partner, though requested so to do, have declined and refuse to pay the same; that their stock of merchandise was sold to the defendant R. B. Gunn in bulk in violation of the Bulk Sales Law (chapter 100, Laws 1908; sections 3129, 3130, 3131, 3132, Hemingway's Code); the violation consisted in the failure of Gunn to demand and the failure of Hurlbert to furnish, at least five days before the sale, the name, place of residence, and post office address of each of the creditors of the said firm, and the amount due each, and that the said Gunn did not in good faith notify personally or by mail each of the creditors of the

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mercantile firm of which the said Gunn had knowledge, or with the exercise of reasonable diligence could have acquired knowledge, of the proposed sale and the cost price of the merchandise proposed to be sold, and the prices to be paid therefor by the said Gunn; that because of this violation the said sale to Gunn is fraudulent and void as against complainant; that complainant is not advised of the value of the stock of goods sold to the said Gunn, nor of the date of the sale, nor the terms upon which it was made, nor how much of the stock of goods originally purchased by Gunn now remain in his possession. The bill prays for a discovery as to the inventory of the goods, the value of them, whether or not the Bulk Sales Law was attempted to be complied with, and the prices paid or to be paid by Gunn, and the amount of this merchandise now remaining in Gunn's hands. Complainant prays for a personal decree in its favor against Hurlbert and Gunn for the amount of complainant's claim against Hurlbert and his partner, and for other and general relief.

The defendant Hurlbert failing to answer the bill, a *pro confesso* and final decree were taken against him.

The defendant Gunn in his answer admits the purchase in bulk of the stock of goods from Hurlbert and his partner and that he had been in possession of them since he purchased them, selling and disposing of them in due course of trade. He attaches a copy of the bill of sale executed to him. He admits the violation of the Bulk Sales Law with reference to demanding the names, etc., of the creditors of Hurlbert and partner, and the failure to notify these creditors, etc. He alleges that he paid in cash for the stock of merchandise to Hurlbert and partner the sum of five hundred and sixty dollars; that Hurlbert and partner represented to him that they owed to other mercantile creditors some seven hundred and fifty or eight hundred dollars, and that they intended to take this money and the proceeds

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from other personal property and satisfy all of their outstanding indebtedness; that Hurlbert and partner used and appropriated all of the money paid them by Gunn to the payment of their creditors, and as a matter of fact paid to other mercantile creditors over one thousand, seven hundred dollars; that the amount paid for the stock of merchandise, namely five hundred and sixty dollars was the actual, fair cash value of the stock of merchandise; that it was all paid to some of the creditors by the vendors, and therefore the defendant Gunn should not be held liable to any of the creditors of this mercantile firm. The answer states on information and belief that Hurlbert and partner owe various and sundry creditors over three thousand dollars and that, if Gunn is liable for any amount to the complainant, he is only liable for such ratio as the total sum due complainant bears to the total indebtedness. The defendant Gunn then makes his answer a cross-bill by praying that, if he is adjudged to be indebted to the complainant, he be allowed to recover from his codefendant, Hurlbert, for this amount. It was then agreed between counsel that the case be tried upon bill and answer, and that the facts alleged therein be considered as substantially correct as stated, and that said bill and answer be considered as evidence.

The final decree of the lower court adjudged that the sale was made in violation of the Bulk Sales Law; that the amount paid by Gunn to Hurlbert was the reasonable value of the goods; that, since the proceeds of the sale were paid by Hurlbert to some of his creditors, though no part was paid to the complainants, it was ordered and adjudged that the complainant recover nothing from the defendant Gunn, but was allowed a personal decree against Hurlbert in the sum of four hundred and seventy dollars with interest.

The appellee, Gunn, admits that the sale was a violation of the Bulk Sales Law, but contends that the

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lower court was correct in dismissing the bill as to him. First, because no personal decree should be rendered against the appellee in this proceeding; second, that appellee paid the market price for the stock of merchandise, and this money was paid to some of the creditors by Hurlbert.

A sale in violation of the Bulk Sales Law is fraudulent and void. *Moore Dry Goods Co.* v. *Rowe*, 97 Miss. 775, 53 So. *Id.*, 99 Miss. 30, 54 So. 6659, Ann. Cas. 1913C, 1213.

The bill in this case is in the nature of a creditors' bill filed against both parties to this fraudulent and void sale seeking to recover the amount of the indebtedness due complainant. The complainant had the right to proceed against the property if it remained in the hands of the fraudulent vendee, or, if disposed of by the fraudulent vendee in whole or in part, he may be held liable for its value; in other words, the creidtor had the right to proceed against the property, or he may treat the transactions as a tort against the property which should have been subjected to his debt, which in this case was less than the value of the property; he may thus waive the tort and sue the fraudulent vendee for the value of the property, or he might pursue both remedies. This proposition is set forth in the case of *Daly* v. *Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

The fact that the appellee, Gunn, had disposed of a part of this property before the suit was filed makes no difference. Having acquired the property through fraudulent and void sale as to the creditors of the fraudulent seller, he stands in the position of a trustee of the property, responsible to the creditors for the disposal of such property. *Appel Mercantile Co.* v. *Barker Dry Goods Co.*, 92 Neb. 669, 138 N. W. 1133; *Fitz Henry* v. *Munter*, 33 Wash, 629, 74 Pac. 1003; *Rubber Co.* v. *Kaufman*, 98 Neb. 562, 153 N. W. 585.

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The fact that the fraudulent vendors of the property applied the proceeds of the sale to the payment of some of the creditors does not discharge this debt as to either defendant. The sale was fraudulent and void and amounts in law to no sale at all. So far as the unpaid creditors are concerned, there has been no sale, but the property which they could have subjected to the payment of their debts has been unlawfully converted to the use of the defendant Gunn.

The answer of the defendant suggested that there were other creditors of the fraudulent vendors, but these creditors were not made parties to this suit, nor have they voluntarily intervened as such. Under the record in this case the appellant is entitled to recover against the defendant Gunn the amount of the debt due it, namely four hundred, and seventy dollars. This is less than the fair market value of the stock of merchandise attempted to be purchased by appellee.

Reversed, and desree here for appellant.

PHILP *v.* DANA.

[83 South. 745, In Banc No. 21009.]

1. SPECIFIC PERFORMANCE. *Correspondence contract which does not describe land is insufficient.*

Where the contract for the sale of land which consisted of correspondence between the parties only described the lands as vendor's land in a certain section and so far as vendor's letters were concerned only as her one hundred and sixty acres in a certain county, there was no sufficient certainty in the description to entitle the purchaser to specific performance.

2. SPECIFIC PERFORMANCE. *Acceptance of offer not specifying details and requiring acts not in offer is insufficient.*

Where the previous correspondence between the parties had not specified all of the terms for the sale of land even the pur-

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chaser's name not being mentioned, and the final acceptance required the vendor to send the deed to a bank where the purchaser resided to deliver on the payment of the money and delivery of the notes, the contract cannot be specifically enforced.

3. SAME.

Before specific performance will be decreed, the tender of performance on the part of the buyer, that is to say, the payment of the money and the delivery of the notes, must be made to the other party at her place of business or residence.

APPEAL from the chancery court of Quitman county.
HON. W. F. GEE, Chancellor.

Bill for specific performance by J. M. Philp against Chas. S. Dana. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

W. M. Donaldson, for appellant.

The gist of the argument on behalf of the demurrer is, or rather was, that there was no binding contract, because the letters were written by W. M. Donaldson, attorney for appellant, instead of by appellant for himself, and that no proper tender of the cash consideration had been made, so as to entitle the appellant to a decree of specific performance of the contract which would bind.

As to the first proposition, while it is nowhere stated in the pleadings and therefore is taken as true, that the attorney did not have a written authority to negotiate the purchase, we think there is ample authority for holding that appellee could bind herself and did so bind herself, by her letters to the attorney in which she agreed to sell the land to attorney's client at a price named in the letter. It was shown in the first letter passing between the parties that the inquiry was made as an attorney for some one, though the name of the real party in interest was not disclosed by the letter and

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appellee could not have been misled in any way by it.

If this were a suit by an agent or attorney of the appellee for commissions for making sale of the land, there would be no doubt of the court holding that, although the owner had made no written contract with the agent or attorney to sell, she would be bound by her agreement to pay commissions. This has been held by this court on numerous occasions and we see no reason why the rule should not work the other way about, and if a principal authorize his agents to purchase lands for him, and in pursuance of such authority, although it be not in writing, such agent contracts for the purchase of lands, the principals would be bound by the act of his agent. The fifth ground of the demurrer (record page 16) sets up that the appellee did not become bound for the reason that there was no contract which would bind appellant. We submit that appellant did become bound by the act of his attorney, to purchase the land at the agreed price. See *Hudson* v. *Thompson,* 70 So. 428.

It has been held in the case of *Stonewall Mfg. Co.* v. *Peek,* 63 Miss. 342, that one has a right to sue on a contract of purchase of personal property made for him by his agent, although the fact of the agency was not disclosed at the time. *Stonewall Mfg. Co.* v. *Peek,* 63 Miss. 342.

It is said to be the general rule, that, as a corollary to the well-recognized principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, the rule is elementary that an undisclosed principal may appear and hold the other party to the contract made with the agent. See 31 Cyc., page 1598.

It is said, however, that a person has a right to know with whom he will contract, and he cannot have another person thrust upon him against his expressed will. *Ibid.* In this case, there was no expressed will against

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contracting with Mr. Philp, Mrs. Dana had knowledge that the attorney was acting for some one else, and made no objection when informed that Mr. Philp was the man with whom she was contracting. The only objection, was that she had decided the price she had asked for the land was insufficient.

It is further said in the same authority (Cyc., page 1600) that the rule is not varied by the fact that such contract was in writing. By the seventh ground of the demurrer, it is insisted that there was no offer of performance by the appellant. We think the bill discloses an ample offer of performance. We do not, however, think it obligatory on us to have gone to Neshoba, Tenn., or elsewhere and there counted out the two thousand dollars agreed to be paid in order to show offer of performance on our part. We believe the offer contained in the bill is sufficient offer to comply with the terms of the contract, where it is alleged after setting out the terms of the contract as contained in the letters to appellee "all of which the complainant is now ready and willing to do, and here offers to the court fully to comply with all the terms of said contract as contained in said letters. All of which he has heretofore offered and still offers to perform all the said agreements made for him by his said attorney as aforesaid, and if required so to do, will pay said sum of two thousand dollars into this court, and now stands ready to do so, as well as to execute said notes and deed of trust."

However, we do not think it necessary that we should offer to perform. The right to specific performance grows out of the contract, and not out of the breach of it. 36 Cyc., page 702. And offer or performance was further made unnecessary for the appellant by reason of the fact that appellee had expressly repudiated the contract. It is said "where the vendor has repudiated the agreement thus making it appear that if the tender were made, its acceptance would be refused tender or

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offer by the vendee before suit is unnecessary. 36 Cyc., page 705. Equity does not require a useless formality. *Ibid.*

We recognize the principle that specific performance is not a matter of right, but in the discretion of the court. But that discretion is largely a matter of course and the right or discretion of the court in such matters is where land is involved, or has been the subject-matter of agreement is not controlled, nor is the jurisdiction to enforce specific performance dependent upon the inadequacy of the remedy at law. It is as much a matter of course for courts of equity to decree specific performance of a contract for the conveyance of lands, as it is for courts of law to give damages for the breach. 36 Cyc., pages 552, 553.

We respectfully submit that the court below should have overruled the demurrer, and that now this cause should be reversed.

St. John Wadell, D. J. Allen, Jr., and *Jas. R. McDowell* for appellee.

First: It is not every contract for the sale and purchase of real estate which a court of equity will require to be specifically performed; in other words, a person is not entitled to specific performance of a contract for the sale of real estate as a matter of course, but must allege and prove that, unless the contract be specifically performed, he will sustain damages of such nature that money compensation, in an action at law will not be full and adequate compensation. Specific performance of such a contract, under the decree of the court, is an extraordinary relief, and to become entitled to such relief, the party seeking it must allege and prove that he has not a full, complete and adequate remedy at law, in an action for damages sustained by reason of a breach

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of such contract, that is, that a court of law cannot administer full and complete relief in the premises.

In the instant case, it is very evident that the sole ground of complaint is the enhanced value of the real estate over the price for which complainant hoped to acquire it. This identical proposition has been decided by the supreme court of Mississippi, and we content ourselves, without citing other authorities, with quoting from the opinion of this court in the case of *Curtis et al.* v. *Blair,* 26 Miss. 309, quoting from page 327 of the report: "Again, it appears from the pleadings and proofs in this case, that the ground of controversy is the mere pecuniary value of the lands in dispute. Both parties are contending for them, because they were worth more in the market than was proposed to be paid for them by Blair. The damages, therefore, for a breach of the contract, to be recovered in an action at law, would afford ample redress; and courts of equity, in such cases will not interfere, except under special circumstances."

"In *Hester* v. *Hooker,* 7 Smede & Marshall, 778, it is said by this court, in speaking of this character; that no certain, definite rule can be laid down which would determine when a party was or was not entitled to such relief. Cases are numerous where both bill and cross-bill have been dismissed, and the parties respectively left to their remedies at law. Where the complainant has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf." Citing: 1 Sugden on Vendors, section 202; *Hepburn* v. *Dunlop,* 1 Wheat. 197; *Hepburn* v. *Auld,* 5 Cranch. 262; *Hatch* v. *Cobb,* 4 Johns. Ch. R. 559, 5 J. C. R. 193.

Second: No valid, binding and enforcible contract is alleged in the complainant's bill; that is to say, the correspondence between Mr. Donaldson and Mrs. Dana,

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relied upon as constituting the contract for the sale of the land in controversy, do not, taken singly or together, constitute a valid, binding and enforcible contract for the sale of lands for several reasons. It will be noted that this correspondence consists of three letters written by Mr. Donaldson to Mrs. Dana and two letters written by Mrs. Dana to Mr. Donaldson. Mr. Donaldson's first letter (Under date of July 16, 1919) was a mere inquiry as to whether Mrs. Dana would entertain an offer for the land, and, if so, what price she would demand and upon what terms she might be willing to sell. This letter was far short of an offer on the part of Mr. Donaldson to purchase the land at any price or upon any terms; it amounted to nothing more than an inquiry. Mrs. Dana's reply to that letter (written by her on July 28, 1919) simply advised Mr. Donaldson that her price was twenty-five dollars per acre, that is, that she thought that sum represented the present value of the land; this letter was not an offer to sell the land to Donaldson or any other person for that sum or for any other sum. The most that could be said as to the effect of this letter is that it possibly invited an offer to buy at that price, but it certainly cannot be said that this letter in itself was an offer to Mr. Donaldson to sell the land to him at that price. The parties were simply negotiating with each other; sounding each other out. It will be noted, further, that Mr. Donaldson did not make the inquiry on behalf of himself, but was professedly acting for an undisclosed principal, and the name of the proposed purchaser was not disclosed to Mrs. Dana until the deed was submitted to her for execution. Inasmuch as she was to receive only two thousand dollars in cash, and the remainder was to be evidenced by three annual notes of the purchaser, it is of course, readily perceived that the identity of the purchaser (who was to sign the notes) was an important factor in the proposed sale, and Mrs. Dana

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was not advised even as to the name, much less the financial responsibility, of the proposed purchaser, until she was confronted with the deed, which she declined to execute. We contend that the submission of this deed together with the purchase money notes and deed of trust, constituted the first *bona-fide* offer to purchase the land, and Mrs. Dana, being at full liberty up to that time either to accept or decline the offer, elected to decline; and her refusal to accept his offer affords the complainant no just ground for complainant to redress which a court of equity will interpose.

In the case of *Haydock* v. *Stow,* 40 N. Y. 363, the defendant had executed an instrument in the following language: "I hereby authorize and empower Peck, Hillman & Parks, agents for me, to sell the following described property (here follows a descripton of the lands): to be sold within —— days from this date on the following terms, viz; three hundred dollars per acre cash, on delivery of deed, or fifteen thousand dollars can remain on bond and mortgage for three or five years, with interest semiannually, if desired by the purchaser; reserving the right to withdraw the property at any time before sale, by giving Peck, Hillman & Parks notice thereof." Subsequently, the plaintiff wrote across the face of the foregoing instrument: "I hereby agree to purchase the property herein nentioned, upon terms expressed," signing the indorsement.

The supreme court of New York held that these instruments taken either separately or together did not form a contract for the sale of land binding upon the owner; nor did his subsequent parol consent to the terms of sale give validity to the transaction.

Again, the name of the proposed purchaser was not contained in the original inquiry written by Mr. Donaldson, and we submit that, in order to constitute a valid, binding and enforcible contract the name of the principal must be disclosed, so that the obligations will be

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mutual. *Crafton* v. *Cummings,* 99 United States Reports, 100 25 Law. Ed. 366; *Mt. Govern* v. *Hern,* 10 L. R. A. (Mass.) 815. The rule is succinctly stated by the supreme court of appeals of Virginia, in the case of *Ford* v. *Euker,* 9 S. E. 500.

So, in the case at bar, we pertinently inquire: Whether, inasmuch as Mr. Philp was not bound to buy, was Mrs. Dana bound to convey? To so hold would mean that equity will take cognizance of a contract without mutual and corresponding obligations. Will this court say that this contract binding on Mr. Philp only at his pleasure and election, is absolutely and at all events binding upon the other party, Mrs. Dana? We apprehend not.

In the case of *Keene* v. *Lowenthal,* 83 Miss. 204, it was held by this court, that "Statements made by the owner of land that he will sell the same to a designated person, contained in private letters of the owner to his broker in regard to the latter's fees, are not alone sufficient to sustain a bill brought by such person for specific performance of a contract of sale."

Another fatal objection to the alleged contract is that the correspondence passing between Mr. Donaldson and Mrs. Dana does not conform to the requirements of a complete contract, in which all details are arranged. For instance, while Mrs. Dana, in her letter of July 28, 1919, stated "My price is thirty-five dollars per acre; the payments two thousand dollars down, remainder in three yearly payments to draw six per cent. interest," she did not agree to accept a mortgage or deed of trust upon the land as the sole security of the deferred payments. It might very well, be too, that the personal financial standing of the purchaser and the consequent worth of his personal notes might have formed an important factor with the owner of the land; *non constant,* the owner might have wished addition to a lien on the land for the payment of the

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deferred installments of purchase money. *Welch* v. *Williams,* 85 Miss. 301.

Our argument to the effect that the letter of Mr. Donaldson written on July 16, 1919, and Mrs. Dana's reply thereto, dated July 28, 1919, was a mere negotiation for an offer, and did not constitute a valid, binding and enforcible contract on the part of Mr. Donaldson or his client to purchase, or on the part of Mrs. Dana to convey, does no violence to the real understanding of the parties. For Mr. Donaldson, in his last letter to Mrs. Dana, under date of August 18, 1919, states Mr. Philp is anxious to begin some work on the land, if he is to get it."

Thus, impliedly recognizing Mrs. Dana's liberty either to accept or reject the offer as contained in Mr. Donaldson's letter of August 6, 1919, in which he enclosed a deed, deed of trust and notes.

Third: The complainant has never offered a sufficient compliance with the contract, if there was a contract in existence. Mrs. Dana, in her letter of July 28, 1919, expressly stipulated that a cash payment of two thousand dollars would be required in the event a sale should be made. In Mr. Donaldson's letter of August 6, 1919, forwarding her the deed for execution and enclosing for inspection the deed of trust and notes proposed to be executed by the purchaser, Mr. Donaldson makes this request: "If satisfactory, sign and acknowledge the deed and return to me or one of the banks here with instructions to deliver when the notes are signed and turned over."

It is to be noted that there is no offer to pay, nor stipulation for the payment, of the cash payment of two thousand dollars which Mrs. Dana, in her letter of July 28th had required; nor was there any offer that Mr. Philp would secure the notes by executing the deed of trust, or any security assuring that he would do so. The demand made by Mr. Donaldson, is that the deed

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should be delivered when the notes are signed and turned over, and no mention is made that the cash payment shall be first required or that the note should be secured by the deed of trust.

Mrs. Dana's letter of July 28, 1919, in which she stated the price at which she held the land, constituted a mere naked offer, for which no consideration whatever was paid or offered. In such cases, the rule is announced by the supreme court of Colorado, in the case of *Rude* v. *Levy,* 43 Col. 482, 96 Pac. 560; 24 L. R. A. (New Series) 91: "It follows from the foregoing that, whatever the rule might be in this regard as to a regular and binding contract, we must hold that, in connection with a naked option or offer to sell, even though the same be in writing, under circumstances like those here presented, a full and proper tender to the vendor of the purchase price or other consideration, in accordance with the terms of the instrument, is as essential condition precedent to a suit for specific performance." *Curts et al.* v. *Blair,* 26 Miss. 309.

In the case at bar, the complainant did not tender to the defendant, or execute, a deed of trust to secure the payment of the purchase money notes or offer any security for the same whatever; nor did he offer to pay upon delivery of the deed the stipulated and required cash payment of two thousand dollars.

The material facts in the case at bar are strikingly similar to the facts in the case of *Robinson* v. *Weller,* 91 Ga. 704, 8 S. E. 447.

In conclusion, we desire to impress upon the court that this is a suit filed by an undisclosed principal to enforce specific performance of a contract alleged to have been made for his benefit by his agent and attorney and that there is quite a difference in this present suit and the decree of proof required than there would be if this were a suit instituted by Mr. Philp's attorney, Mr. Donaldson, for commissions. Construing Mrs. Dana's

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letter of July 28th in a light most favorable to the complainant, it amounted to a mere offer to list the lands with Mr. Donaldson for sale at a stipulated price and given terms. Whether, in a suit brought by Mr. Donaldson for breach of the supposed contract with him he would be entitled to recover any profit which he might have made by selling the property at an enhanced figure, is a question not raised nor necessary to be decided in the present case, and is a query which may be left open for determination. Whatever Mr. Donaldson's rights, remedy and relief might be, we respectfully urge and insist that the present appellant, J. M. Philp, not being shown to be connected with or bound by the supposed negotiations with Mrs. Dana, he is not entitled to a decree for the specific performance of such supposed contract.

We respectfully submit that the demurrer to the bill of complaint was rightfully sustained; that the bill does not allege a cause of action entitling the complainant to the relief extraordinarily sought therein; and that the decree of the Chancellor dismissing the bill should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The appellant filed a bill in the chancery court to enforce specific performance of a contract for the sale of land. The alleged contract was based on correspondence. Mr. Donaldson wrote appellee as follows:

"I understand that you probably own one hundred and sixty acres of land in section 7, township 27, range 1 west in Quitman county, Miss., which you would probably sell. If this is so, I would be glad to have you price the same to me, giving me your best cash price, also your best price on terms, and what kind of terms you would be willing to make in the events of the sale.

"I have a client who is interested in this piece of land and he understands that you are the owner. (Signed) W. M. Donaldson."

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To this letter the appellee replied as follows: "Your letter in regard to the one hundred and sixty acres of land which I own in Quitman Co. is received.

"My price is thirty five dollars an acre. The payments two thousand dollars down, the remainder in three yearly payments to draw six per cent interest. (signed) Mrs. Charles S. Dana."

On August sixth Donaldson wrote the following letter: Your letter of the forth received, and noted. I had already taken up the matter of the sale of the land with the man I had in mind and told him what it could be had for, and he agreed to take it at thirty-five dollars per acre, the price named in your first letter. Therefore I could not raise the price on him in order to make a commision. I thought as you were getting more than a hundred per cent. profit, you might be willing to allow the usual commission for making sales, and have practically closed the deal, and I will therefore let it go through, even if I do not get anything out of it.

"Of course, I can only blame myself for not getting anything for my effort in selling the place, but it will teach me to be a little more careful the next time.

"I have prepared the deed, deed of trust and notes in accordance with your first letter, dating them all as of August 1, 1919, which I herewith submit to you for your signature and approval. If satisfactory, sign and acknowledge the deed, and return to me or one of the banks here with instructions to deliver when the notes are signed and turned over.

"Sorry I have lost my time and postage, but suppose it cannot now be helped.

(Signed) W.M. Donaldson."

It will be noted from this last letter that the appellee wrote a letter on the 4th of August, the contents of which do not appear in the record. The bill for specific performance alleged with reference to the ownership of land involved in the suit as follows: "Your complainant

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would further show to the court on July 16, 1919, and prior thereto the defendant was the owner in fee simple of the lands in Quitman county, Miss., known and described as the Northeast quarter of section 7, township 27, range 1 West and is still the record owner of said lands at the filing of this bill."

The bill sets out by averment that the letters above set out passed between the said Donaldson (who is alleged to have been attorney and acting for the appellant) and the appellee demurred to the bill on several grounds, and the demurrer was sustained and the bill dismissed, from which decree this appeal is prosecuted.

The bill does not allege that the appellee was not the owner of other lands in the said county or the said section, township, and range. It will be noted from the correspondence that no particular one hundred and sixty acres of land was described therein. The appellant sent unsigned notes and an unsigned deed of trust and an unsigned deed, with the request that the appellee sign the deed and return it to Donaldson or to a bank, to be delivered on the signing of the notes and deed of trust. The bill did not have attached, nor was there tendered with the bill, any money or any signed notes and deed of trust, but the bill merely offered to pay the money and sign them after decree for specific performance.

We do not think that the bill presents a proper case for a specific performance. There is no description of the property to be conveyed in the correspondence. The description contained in the correspondence could be applied to any land in said sections, township and range, and so far as the letters of the appellee are concerned it merely refers to one hundred and sixty acres of land in Quitman county. In *Welch* v. *Williams,* 85 Miss. 301, 37, So. 561, our court said:

The elementary general rule, as frequently enunciated in reference to the enforcement of specific performance of contracts, so far as relates to the particular branch

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of the subject here presented for consideration, is that the contract must be specific and distinct in its *terms,* plainly show with certainty that the minds of the parties had met and mutually agreed as to all its details upon the offer made on the one hand, and accepted upon the other. If any of these requisites be lacking, specific performance will not be decreed by court of equity."

This court has held in several cases that to enforce specific performance there must be certainty in the description of the thing to be performed before the court will decree specific performance. *Everman* v. *Herndon,* 71 Miss. 823, 15 So. 135; *Montgomery* v. *Norris,* 1 How. (Miss.) 499; *Beaver* v. *Crump,* 76 Miss. 34, 23 So. 432; *Romer* v. *Cannady,* 79 Miss. 222, 30 So. 638, 55 L. R. A. 328, 89 Am. St. Rep. 593.

The correspondence relied on does not disclose, until the notes and deed of trust were sent to appellee, who the purchaser was, nor does the bill disclose the financial condition of the appellant. It does not appear what kind of notes were intended to be executed for the deferred payments; whether such notes were to be bankable notes nor whether payable to order or to bearer, or whether the note was to carry a vendor's lien or not. It is manifest that the details of the transaction would have to be settled by further agreement. Again the acceptance was not accompanied with the cash payment nor with executed papers sufficiently explicit to have closed the transaction by their acceptance by the appellee, before a specific performance will be decreed the tender of performance on the part of the appellant; that is to say, the payment of the money and the delivery of the notes, must be made to the other party at her place of buisness or residence, and this was never done. *Robinson* v. *Weller,* 81 Ga. 704, 8 S .E. 447. In that case Mrs. Weller advertised property for sale as follows:

"For sale my place in East Rome, corner Howard avenue and E. T. R. R. adjoining Mr. H. B. Parks, for price

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address me at 531 Montgomery avenue, Chattanooga, Tennessee."

To this notice Robinson addressed a communication to Mrs. Weller as follows: "You will please quote me your lowest cash figure, one-third cash, balance in twelve and eighteen month's time on lot adjoining park East Rome, and advertised in the Morning Courier. An early reply will oblige. Thos. L. Robinson."

To this letter Mrs. Weller replies as follows: "Received your card with four others asking the same question. In reply I ask two thousand dollars for my place, one-third cash, balance in twelve and eighteen months with legal interest on it."

To this Robinson replied by telegram as follows: "Offer accepted. Money ready. Send deeds at once."

This telegram was followed by letter as follows:

"Your letter received offering me your house and lot in East Rome at two thousand dollars, one-third cash one-third twelve months and one-third in eighteen months with legal interest on deferred payments. I wired you this a. m.. 'Money ready, offer accepted, send deeds at once.' I am prepared to make the necessary papers and would be pleased to have deeds come foward promptly. This price seems a little full and perhaps you would prefer to discount it slightly and get a cash payment in full for the place. If so let me know and I think I can arrange it."

Mrs. Weller wrote Robinson in reply: I am sorry to write you but just after writing you I received a better offer. I have not accepted any offer yet. I received three telegrams to-day."

With this evidence the testimony closed and the defendant demurred to the evidence and the court granted nonsuit holding that the plaintiff could not recover because the correspondence did not amount to a complete contract between the parties. Upon appeal the Georgia supreme court said:

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It is true that a contract can be made by correspondence through the mail as well as when the parties are together, and the same rules will apply in either case. But in order to make any sort of contract, the offer of the seller must be accepted by the purchaser, unequivocally, unconditionally, and without variance of any sort there must be a mutual consent of the parties thereto and they must assent to the same thing in the same sense. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract because there does not exist the requisite mutual assent to the same thing in the same sense. Both parties must assent to the same thing to make a binding contract between them. Applying these principles to the facts of this case, we find: (1) An advertisement in the newspaper by Mrs. Weller of a certain house and lot for sale; (2) a postal card addressed to Mrs. Weller by the plaintiff inquiring as to her price and terms; (3) a letter from Mrs. Weller, the defendant, stating her price and terms; (4) a telegram from the plaintiff to the defendant, saying: Offer accepted, money ready; send deeds at once,—and a letter of the same date amplifying the telegram and stating the same thing in substance."

The court held that her offer meant that she would accept the cash at her place of residence in Chattanooga, and that she was not compelled to make the deeds and send them to Rome, Ga., nor go to Rome, Ga., for the cash payment, and held that the above did not constitute a binding contract. It will be noted that the letter sending the deeds and notes to appellee above quoted closed with the following:

"If satisfactory, sign and acknowledge the deed and return to me or one of the banks here with instructions to deliver when the notes are signed and turned over."

This letter carries with it the recognition that the appellee is to approve the papers sent, and it is silent as to payment of money. We think the appellee was en-

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titled to the right to pass upon the solvency of the buyer and the character of security for the deferred payments which she would demand. She was not compelled to take a deed of trust but could require a bankable note, and had a right to have these delivered to her at her place of residence, and if this was not done the complainant was not entitled to the relief prayed for.

The court below having reached the same result, the judgment will be affirmed.

Affirmed.

FAIRLY v. ALBRITTON.

[83 South. 801, In Banc. No. 21011.]

TAXATION. *Filing list of lands sold at special sale thirty four days there after not "immediately" under the statute.*

Under Code 1906, section 4367 (Hemingway's Code, section 7006), requiring that the list of lands sold for taxes at a special sale should be filed with the chancery clerk immediately," the word "immediately" means as soon as practicable under the circumstances and where such list was short and could easily have been prepared and filed within a few days after the sale, the filing of such list thirty-four days after the sale was not a compliance with the statute.

APPEAL from the chancery court of Harrison county.

HON. WM. D. BULLARD, Special Chancellor.

Suit by Mrs. Jennie T. Albritton against Mrs. N. M. Fairly. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

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Oscar Baxstrom, for appellant.

We do not contend that the list of lands filed under sections 4367 and 2935, of the Code of 1906, being the same as section 4, chapter 67 of the Laws of 1902, in force at the time of the tax sale herein involved, must be filed within thirty days and counsel is in error in averring that we have attempted to thus construe the requirements of said statute. This statute says that the list must be filed immediately, and we contend that it means exactly what its plain unambiguous language sets forth. Even if we should give the word "immediately" the meaning suggested by counsel, we respectfully submit that the delay shown in this case of the filing of the list could never be construed to be within a reasonable time. The sale was made on the first Monday and the following day, being the 6th and 7th days of July, and the court can readily see that this list was not filed until the second Monday, the 10th day of August. At the regular time for making tax sales as the law was written when this sale took place, the tax collector was allowed from the first Monday of the month in which the sale was made until the first Monday of the succeeding month to file his conveyances and lists. But in this instance, in the case of a special sale, the tax collector made the sale on the first Monday and the following day of one month and filed the list of land sold to the state on the second Monday of the following month, and that, too, in the face of a statute requiring that the same be immediately filed, we cannot conceive how a more liberal construction could be put upon the word "immediately" as used in this statute than by saying that it means such time as would allow the tax collector, by using due diligence and effort, to prepare his conveyances and lists and file the same with the clerk of the chancery court, and we submit that this record shows that such was not done and com-

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plied with. As above stated, we submit that such a construction would be liberal indeed.

Counsel says that the object of filing this list is to give notice to the world, and argues from that proposition that because the list had been filed some ten years or more before the land was sold by the state all purposes of the statute had been fully met. We submit that such an argument really needs no answer. Its fallaciousness condemns it. The purpose of the statute was to give notice to the landowner and to all interested in the land. The filing of a tax conveyance in the office of the chancery clerk to there remain for two years from the date of the sale is not notice to the world, and if the purchaser at such tax sale neglects to file such conveyance for record, even though it has already been on file in the office of the clerk of the chancery court for two years from the date of the sale, he is liable to lose the land so bought to an innocent purchaser, for sales without notice as this court has already held in the case of *Sinster* v. *Barber*, cited in our former brief. According to counsel's argument the time of the filing is immaterial, providing the list remains on file for a great number of years.

We respectfully submit that this case should be reversed and the bill dismissed.

Jas. R. McDowell, for appellee.

Upon re-reading counsel's brief it is noted that he attempts to construe section 2935 of the Code of 1906, as requiring a tax collector in making a sale of lands to individuals for taxes to the state to file the list of same with the chancery clerk within thirty days. Just how he arrives at the time in which this list should be filed is not disclosed unless by inference he concludes that because the conveyance of lands sold to individuals on the first Monday of March, the regular time, for such

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sale fixed by law, must be filed on or before the first Monday of April, "there to remain for two years from the date of sale."

Counsel doubtless infers that thirty days always elapses between the first Monday in March and the first Monday in April. In the first place, this is fallacious. For instance, if the first Monday of March came on the first day of March, then the first Monday of April would be the fourth day of April, or thirty-five days later. In the instant case the list was filed thirty-four days later. But there is nothing in section 2935 which requires such list to be filed within thirty days, or within any other given period. If counsel insists that such list must be filed before the first Monday in April where a sale is made in August, then this has been done. Strictly construed, this means the first Monday of April following, as we held in the *Weston Case,* 109 Miss. 362, construing section 2933, Code of 1906.

If counsel insists that it must be done immediately to use the words of section 2935, which is the same as section 3850 of the Code of 1892, in force at the time this sale was made, then what is meant by 'immediately?' There can only be one fair interpretation and that is that it must be done within a reasonable time. Thirty-four days is not an unreasonable delay, because the very statute, section 4338 relied on by counsel in reckoning his time, permits that much delay, as heretofore demonstrated.

Counsel also seems to lose sight of the principal object of filing this list. Its object is to give notice to the world. According to section 4338 the conveyance to individuals must remain on file "two years from the date of sale." So therefore, if the land is sold at the regular time to an individual, although the conveyance is not recorded until a month later, the notice given by filing will not be a full two years' notice, but only one year and eleven months since the requirement is that it shall remain

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on file "two years from the date of sale," but, coupled with this provision is the requirement that it must be done within about thirty-four or thirty-five days at most.

Since writing my brief a few days ago I have had occasion to examine 4 Cyc., section 3267, and call attention to the collection of authorities therein cited. Respectfully submitted.

HOLDEN, J., delivered the opinion of the court.

This case is here on appeal the second time. See *Albritton* v. *Fairley,* 116 Miss. 705, 77 So. 651. It involves the validity of the tax title to a lot in Gulfport. In our former decision of reversal we held that certain oral and documentary proof could be made in aid of the ambiguous description in the tax deed. When the case was heard the second time in the lower court, the appellant, who was defendant there, presented a new defense to the action, which is that the tax sale was void because the tax collector failed to immediately file in the office of the chancery clerk a list of the lands sold at the tax sale as required by section 4367, Code of 1906 (section 7006, Hemingway's Code). We here quote this section.

"4367. How Land Not Sold at Regular Time May be Sold.—If from any cause a sale of any land for taxes which is liable to such sale shall not be made at the time appointed by law for such sale, it may be sold thereafter, in the same or a subsequent year, at any time designated therefor by order of the board of supervisors, Notice of a sale so ordered shall be given by advertising it in the manner prescribed by law for the sale of land for taxes; and the same shall be made at the same place and subject to all the provisions of law applicable to such sale at the time appointed by law, and a list of lands sold to the state and of conveyances to individuals

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shall be immediately filed in the office of the clerk of the chancery court, who shall at once record the list and send to the land commissioner a certified copy of it; and conveyances to individuals shall be dealt with as those made at the time appointed by law are required to be; and such list and conveyances shall be as valid and have the same effect and be subject to all the provisions of law applicable to such list and conveyances made of land sold at the regular sale for taxes."

It appears that the lot here in question was sold by the tax collector at a special tax sale designated by the board of supervisors on July 7, 1903, for the taxes of 1902. The tax collector filed with the chancery clerk the list of lands sold to the state, which included the lot here involved, on the 10th day of the following August. Thus it will be seen that the list of lands sold was not filed with the chancery clerk until thirty-four days after such sale.

It is contended by the appellant that the filing of the list thirty-four days after the sale invalidates the tax title under the provision of the said section 4367. A decision of this point will end the case.

The question, then, is whether or not the filing of the list thirty-four days after the sale is an "immediate" filing as required by the statute. It may be observed in in this connection that the list of lands sold at a regular tax sale is required to be filed between the first Monday in one month and the first Monday of the following month. But in special tax sales, under section 4367, it is provided that the list shall be immediately filed in the office of the chancery clerk. Would it be reasonable to say that the filing of the list thirty-four days after the sale was a compliance with the statute? Does the requirement of the list to be immediately filed mean that it may be filed within a reasonable time after the sale?

We must interpret the meaning of the statute by its plain language. We are of opinion, therefore, that the

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tax collector failed to comply with the statute. Certainly it cannot be said that the filing of the list thirty-four days after the sale was an "immediate" filing with the clerk; nor can it be well contended that the filing of the list thirty-four days after the sale was within a reasonable time under the circumstances in this case. We think the word "immediately" in the statute means that the finding must be done as soon as practicable, under the circumstances, after the sale. It was not intended to signify that the filing might be done within a reasonable time, unless it may be said it means that it must be filed at once within such reasonable time as is practicable under the circumstances. But surely a failure to file the list until after thirty-four days cannot be said to be "immediately," or as soon thereafter as it was reasonably practicable to do so. Therefore the failure of the tax collector to comply with the statute was fatal and rendered the tax sale void.

It is said in a case cited in Words and Phrases (*Hexamer* v. *Sonthal,* 49 N. J. Law, 682, 10 Atl. 281) that—"The terms 'immediately,' when used in speaking of an act required to be immediately performed, is stronger than the expression 'within a reasonble time;' yet many circumstances might arise where an act to be done within a reasonable time must be done immediately."

And again from the same authority it is said: "'Immediately' is a term of relative signification, and never designates an exact portion of time, and is used with more or less latitude by universal consent, according to the subject to which it is applied."

It seems clear to us that the legislature meant to provide that in special tax sales, as distinguished from regular tax sales, the list of lands sold should be immediately filed with the chancery clerk, not on or before the first Monday of the next month as in regular sales, but "immediately"—that is as soon as practicable under the

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circumstaces; as soon as the collector could conveniently make up the list and file it with the chancery clerk. In this case the list of lands sold at the special sale was very short and could have easily been prepared and filed within a few days after the sale. Therefore the filing of the list thirty-four days after the sale was not an "immediate" filing within the meaning and contemplation of the statute.

The decree of the lower court is reversed, and judgment here for the appellant dismissing the bill.

Reversed and dismissed.

JONES v. BRANTLEY.

[83 South. 802, In Banc. No. 20990.]

1. ATTORNEY ENTITLED TO RETAINER THOUGH SOME SERVICES PERFORMED ON SUNDAY.

Where an attorney made a retainer contract with his client on a secular day and stayed in town for ten days at the request of his client, neglecting to attend to other matters waiting to close up the business of his client, he was entitled to recover a reasonable fee as a retainer and a reasonable amount for his time in remaining in town instead of leaving to attend to other matters, though some of the services rendered were performed on Sunday in violation of section 1366, Code 1906 (Hemingway's Code section 1102), such a contract not being an indivisible one.

2. SUNDAY. *Services of attorney in rearranging partnership business not work of necessity or charity.*

Services rendered by an attorney in rearranging a partnership business is not a work of necessity or charity under Code 1906, section 1366 (Hemingway's Code section 1102) prohibiting the performance of work on Sunday except housework or other work of necessity or charity.

3. SUNDAY. *Certain legal services may be performed on Sunday.*

There are some services that an attorney may lawfully perform on Sunday, as the law expressly authorizes certain suits and other legal matters to be done on Sunday and where his contract is not an indivisible one the performance of other work on Sunday prohibited by law does not vitiate the entire contract.

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APPEAL from the circuit court of Humphreys county. HON. H. H. ELMORE, Judge.

Suit by Jesse D. Jones against J. G. Brantley. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mayes & Potter, for appellant.

This was a contract, according to the testimony of Mr. Jones in the case, entered into upon a week day, and while some things were done on Sunday, some conferences held, etc., most of the work was done on week days.

In this suit several different performances on the part of Mr. Jones are clearly shown in the testimony, and while the suit is for a lump sum, nevertheless, under proper instructions, if a portion of the work done by Mr. Jones was illegal because such work was done on Sunday in violation of our statute, certain other items shown by the evidence, and several from the others were susceptible of being valued separately and apart from the items that might be illegal.

As stated above, there is one item set out in the evidence of Mr. Jones; that of remaining in Belzoni at the request of the defendant for a period of ten days. This item for which if Mr. Jones' evidence should have been believed by the jury, would have clearly entitled the plaintiff to recover, is now tainted by the violation of the Sunday law. The same is true in the drawing up of the bill of sales, notes, etc., and advice given relative thereto, and other separate items set out in the evidence of the plaintiff.

It is held in 9 Cyc., page 569, that: "Where the agreement of several promises based on several considerations, the fact that one or more of the considerations are illegal will not avoid all the promises, if those which are made of illegal considerations are severed from the others. Thus where goods are sold at a separate price

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for each article, and the sale of some of the articles is illegal, an action will lie nevertheless for the price of any of the other articles. The same principle applies in proper cases to contracts to pay for labor or services."

We, therefore, insist that at all events it should have been submitted to the jury whether or not Mr. Jones was entitled to recover for those items of work shown by the testimony to have been done on week days under a contract made on week days. There were separate promises based on several considerations. At least in the sense that the consideration for each and every item of work was necessarily a severable consideration, and while no bill of particulars was set out in the declaration, yet the defendant did not ask for a bill of particulars, and on a new trial if it is so desired, the defendant can make a motion to require the plaintiff to particularize the different items of work for which he expects recovery, and if there are items which are illegal because performed on the Sabbath day these items are readily severable from the items of work performed on week days.

Where a contract for work is made on Sunday but performed on week days, while the Sunday contract cannot be enforced, the employee can recover on a "*quantum meruit*" for services already rendered on week days. *Thomas* v. *Hatch,* 53 Wis. 296, 10 N. W. 393.

We submit that this is a case that should have been submitted to a jury on the question of whether or not Mr. Jones should recover for his services, especially for those items of service which there is no evidence to show were in any way tainted by the violation of the Sunday law.

Cashin & Murphy, for appellee.

"Contracts to perform something prohibited by statute are void whether made on Sunday or on a

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secular day—entire contracts providing for part performance are void where the acts to be performed on Sunday are prohibited by statute; and no recovery can be had for the part performed on a secular day." 27 Am. & Eng. Ency. Law, 410.

According to the well-settled and firmly-established law of Mississippi, a contract of this nature made for the performance of work on Sunday will not be enforced by the courts, but will be treated as an absolute non-action, a legal nullity, and the parties left where they have placed themselves. It is a principle of such universal respect as to have now almost, if not quite, ripened into an axiom of the law, that a contract made for the performance of any manner of work upon the Sabbath is void as against good morals and in contravention of the statute. These principles we suppose to be of such an elementary nature and so familiar to everyone that we do not here burden the court with a citation of the authorities sustaining them. And such a case is this, according to the testimony of appellant and the interpretation placed upon it by counsel.

If appellant is entitled to any relief at all then for services alleged to have been rendered on secular days (in connection with the same subject-matter, be it remembered), and in furtherance of Brantley's design and purpose as disclosed on the Sabbath, such relief would necessarily depend upon the severability of the contract into a number of unrelated, separate, component parts, or into a number of disassociated, disconnected, independent contract, which we say was impossible from the very nature of the contract itself, and which severability features will be discussed later in this brief.

In our own case of *Kountz* v. *Price & Dixon,* 40 Miss. 341, we have an action for recovery on a contract executed in consideration of an agreement between appellant and appellees for the exchange of salt for cotton,

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pound for pound, the complainant alleging the delivery of the salt to defendants and the execution by them of a due bill in favor of complainant. The suit was defended on the ground that the agreement being made and the salt delivered on Sunday (although it was admitted that the due bill or contract was subsequently executed on a secular day). It was void as against good morals and in violation of the Sunday statute. The court held that the contract was void and the subsequent execution of the due bill on a secular day could not affirm the previous contract so as to validate it and relieve it of its taint of illegality, and that the complainant could not recover back his salt or the value thereof, and refused to overrule principles repeatedly and invariably recognized by this court. The opinion goes on to say:

"The principle of public policy is this," says Lord Mansfield, in *Holman* v. *Johnson* (Cowp), *"Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of the country, then the court says he has no right to be assisted." See *Cuthbert* v. *Haley,* 8 J. R. 394.

Not to cite the almost numberless authorities in England and this country affirming this principle, and applying it to all sorts of contracts founded on illegal considerations, and to all phases into which they passed we will refer to a few of numerous cases upon the subject in this court. *Collins* v. *McCargo,* 6 S. & M. 128; *Armstrong* v. *Toler,* 11 Wheat. (U. S.) 258, 6 L. Ed. 468; *Wooten* v. *Miller,* 7 S. & M. 386; *Coulter* v. *Robertson,* 14 S. & M. 29; *Adams* v. *Rowan,* 8 Ib. 638; *Torrey* v. *Grant,* 10 Ib. 97."

Having already established that the original contract in the case here presented on appeal was entered into

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on Sunday, the only distinction to be drawn then between it and the *Kountz case, supra,* is that in the latter, all the salt was delivered on Sunday, while in this case only part of the services was actually performed on Sunday.

This, therefore, squarely confronts us with the propositions whether the court will lend its aid to enforce a contract. First: Where it grows immediately out of an illegal or immoral act; Second: Where it is connected with an illegal act; Third: Where only a part of the consideration is illegal and out of these grows the question; Fourth: Whether illegal contracts can be divided and held valid in part and invalid in other parts.

We respectfully refer the court to the cases of *Wooten* v. *Miller,* 7 S. & M. 380, and *Armstrong* v. *Toler,* 11 Wheat (U. S.) 258, (6 L. Ed. 468), for an answer the first three of the propositions, *Craig* v. *Missouri,* 4 Pet. 410; *Gray* v. *Hook,* 4 N. Y., 4 Comst. 449; *Nellis* v. *Clark,* 4 Hill. 424; *Handy* v. *Globe Pub. Co.,* 4 L. R. A. 466, 16 A. S. R. 695; *Perkins* v. *Cummings,* 2 Gray, 258; *McNamara* v. *Gargett,* 68 Mich. 454, 13 Am. St. Rep. 355; *Santa Clara, etc., Co.* v. *Hayes,* 76 Cal. 387, Am. St. Rep. 211.

While we have no access to the case of *Thomas* v. *Hatch,* 53 Wis. 296, 10 N. W. 393, the only case cited in appellant's brief, and must accept counsel's statement of same, still it is conceded that the rule here stated is the law as declared in some isolated cases by the courts of other jurisdictions; but the better, and far more generally accepted and recognized doctrine. is that announced in a long line of decisions of our own courts and repeatedly affirmed by the courts of other states, and is directly contradictory of this rule laid down by the Wisconsin court. *Block* v. *McMurry,* 56 Miss. 219.

It will be seen from an examination of footnote No. 41, on page 569, of 9 Cyc., the only other reference con-

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tained in counsel's brief, that this principle of severability of contracts and considerations which it is there stated may apply in proper cases to contracts to pay for labor or services, has reference to contracts in nowise connected with, related to, and therefore not tainted by, the original illegal contract. *Johnson* v. *Dohlgren*, 31 N. Y. App. Div. 204.

It may be contended that the defendant was a party to, implicated in, and the beneficiary of, the illegal act as a reason why he should not have the benefit of it as a defense here, but this objection is without legal force. *Holman* v. *Johnson*, — Cowp. —.

As To Recovery on "*Quantum Meruit.*"

Now as to the argument that plaintiff is entitled to recover of a *quantum meruit;* we submit that this position is untenable. *Quantum meruit* is based upon what in law is termed an implied contract to pay what is deserved, and is in fact nothing more than an implied contract, the only difference between which and an express contract being in the mode or manner of proof. Obviously then as stated in 2 Ruling Case Law, p. 1046.

"Every objection to permitting a recovery upon an expressed contract applies with equal force to a recovery upon a *quantum meruit,* and this is true even when the services are not intrinsically illegal, but are improper and contrary to public policy, because of circumstances under whch they are rendered."

It was not a new contract, founded upon a different consideration, but was related to, directly connected with, and grew immediately out of the original Sunday contract, and as stated in *Wooten* v. *Miller,* and in *Armstrong* v. *Toler, supra*: "Where the contract grows immediately out of, and is connected with, illegal or immoral act, a court will not lend its aid to enforce it," unless the promise be unconnected with the illegal act and is found upon an entirely new consideration.

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Conclusion: In conclusion, if the court holds that the original contract of employment had its inception on a week day, yet it must be assumed from the testimony of plaintiff as to his employment that it was contemplated at the time and understood between the parties that most, or at least part of the work was to be done on Sunday, and that the rendition of such services on Sunday, tainted the whole contract with illegality of which it could not be purged by any subsequent act of the parties, and that the contract being one of entirety and not capable of being separated into several distinct and smaller contracts founded on new and different considerations the whole contract must fail.

But, if the contract, as we are firmly convinced, had its beginning on the Sabbath, as against good morals and the law of the land, was partly performed on the same day; and other services were rendered on subsequent Sundays and secular days, as anticipated at the time of the general employment, all being rendered in connection with and furtherance of, and growing immediately out of the same illegal contract and subject-matter, and looking to the end accomplished, then we insist that there was no issue for the jury; that the contract was entire, inseparable and indivisible, and tainted throughout with its original illegality. See *Handy* v. *St. Paul Globe Pub. Co.*, 4 L. R. A. 466; 16 Am. St. Rep. 695 (and note); *Williams* v. *Hasting,* 59 N. Y. 373. That it is not susceptible of ratification in whole or in part; that, therefore, a recovery on *quantum meruit* will not lie, and the peremptory instruction granted to defendant was based upon a correct interpretation of the law, and not error.

We respectfully submit, therefore, that the services herein rendered do not come within any of the exceptions of section 1102 of Hemingway's Code (sec. 1366, Code of 1906), which, as amended by ch. 25 of the laws of 1917, provides that: "If any person on the first

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day of the week commonly called Sunday, shall himself labor at his own or any other trade, calling or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity or other work of necessity or charity, he shall, on conviction, be fined not more than twenty dollars for every offense deeming every apprentice or servant so employed as constituting a distinct offense; but nothing in this section shall apply to labor on railroads or steamboats, telegraph or telephone lines, street railways or in the business of livery stable, garage or gasoline stations, meat market or ice house."

That judgment of the court below should not be disturbed, because so to do would tend to destroy the effect of a most beneficent statute founded upon the divine law, and wisely intended to promote public morals and induce the observance of the duties of religion in society.

ETHRIDGE, J., delivered the opinion of the court.

Appellant sued the appellee for professional services as an attorney for the sum of five hundred dollars, alleging that the appellee was engaged in a mercantile business in a partnership, and that he desired the professional services of plaintiff in re-arranging or adjusting the partnership business, and that the value of the stock, etc., involved in the mercantile business amounted to thirty thousand dollars, and that the services so rendered were reasonably worth five hundred dollars.

The defendant filed the general issue and a special plea alleging in the special plea that the contract and legal services were entered into and performed on Sunday, and that the said services were in violation of the laws of the state of Mississippi and would not support an action. He also gave notice under the general issue to the same effect and alleged that the employment was

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gross, entire, and not divisible, and in such notice alleged that thereafter further services in connection with said matter were rendered by the said plaintiff on Sunday, the 23rd day of June, 1918, and on secular days thereafter, to which said plea and notice under the general issue the plaintiff in his replication said that the said contract was not entered into on Sunday as alleged. At the conclusion of the evidence the court gave a peremptory instruction for the defendant, and judgment was entered thereon for the defendant, from which judgment this appeal is prosecuted.

There is a conflict in the evidence between the plaintiff and the defendant as to whether the contract was entered into on Sunday, but the plaintiff admits that he did some of the work and had certain consultations in reference thereto on Sunady. The testimony of plaintiff with reference to employment in part is as follows:

"Some time along the middle of June, 1918, last year, one day along about Thursday or Friday of the week, Mr. T. L. Gilmer and myself were standing on the corner talking by Parker & Parker's store. Mr. Brantley walked up and spoke to us and stood there and talked a few minutes about different things, and said to me, 'I want to see you and talk to you a little.' I said, 'All right.' He said, 'Clint Abrams and two or three other traveling men know you pretty well and said you were a good lawyer, and I have some business I want you to attend to.' I said, 'All right.' "

He further testified that Brantley asked him would he be in his office on Sunday; that he usually attended to such things on Sunday, and that he replied that he would be if Brantley wanted to see him; that he did business and did some writing in reference to the said business; that it was necessary for them to see the other partner in reference to the new contract; and that Brantley requested the plaintiff not to leave town, as he wanted him to see his partner and do the talking when

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his partner came to town. Plaintiff testified further that he waited some ten days for Brantley's partner to come because of Brantley's request, and that he neglected to make certain trips and to attend to certain other business because of a request of Mr. Brantley that he would not leave town.

It further appears that the plaintiff drew the contract of partnership between Brantley and his partner, or rather closed their business by a contract, that there was no agreement about the amount of the fee, but that after the business was concluded he sent his statement of his fee to the defendant, to which the defendant failed to reply, and he subsequently sent other statements and finally wrote Mr. Brantley:

That if the fee was not all right he would like to know about it. "I am due the courtsey of some attention in the matter of at least an explanation of why the delay of payment."

To this the defendant replied: "I am in receipt of your bill for two hundred and fifty dollars, also note what you say and fully intended to see you and talk with you about this bill, but owing to illness and being very much overworked have not been able to get to this. However, I want to say to you I think your charges are entirely too much. I would be glad to pay you what is right as soon as we can get this matter straightened out."

The plaintiff's testimony and that of other lawyers shows that the services rendered were reasonably worth five hundred dollars, but a peremptory instruction was given for the defendant on the theory that the services were rendered on Sunday in violation of section 1366, Code of 1906 (section 1102, Hemingway's Code), which reads as follows:

"1366. Sabbath; Violations of Generally.—If any person, on the first day of the week, commonly called Sunday, shall himself labor at his own or any other trade, calling, or business, or shall employ his apprentice or ser-

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vant in labor or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall, on conviction, be fined not more than twenty dollars for every offense, deeming every apprentice or servant so employed as constituting a distinct offense; but nothing in this section shall apply to labor on railroads or steamboats, telegraph or telephone lines, street railways or in the business of a livery stable, meat market or ice house."

The plaintiff's testimony as we view it shows the retainer contract between the plaintiff and his client was made on a secular day, and his testimony shows further that he stayed in town for ten days at the request of defendant, neglecting to attend to other matters, waiting to close up the business for the defendant. It shows that some of the services were rendered on Sunday but the contract is not shown to have been made on Sunday so far as the plaintiff's testimony is concerned. The plaintiff was entitled to recover a reasonable fee as a retainer, and a reasonable amount for his time in waiting in Belzoni at the request of the defendant, if his testimony as to these facts is believed by the jury.

It is our opinion that the services rendered on Sunday as shown in this record were not a work of necessity or charity in the meaning of the statute. There are some services that an attorney may lawfully perform on Sunday, as the law expressly authorizes certain suits and other legal matters to be done on Sunday. We do not think the contract an indivisible one. There was no contract for the gross amount, but plaintiff was depending upon the value of the retainer and particular services performed under the retainer, and for such time as he was detained in Belzoni on secular days. This view of the law, we think, is supported by *Duggan v. Champlin*, 75 Miss. 441, 23 So. 179; *W. U. Tel. Co.*

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v. *McLaurin*, 70 Miss. 26, 13 So. 36; and *Campbell* v. *Davis*, 94 Miss. 164, 47 So. 546, 19 Ann. Cas. 239.

The judgment of the court below is reversed, and the cause remanded for a new trial in accordance with this opinion.

Reversed and remanded.

SYKES, J., dissents.

FEEMSTER *v.* CITY OF TUPELO.

[83 South. 804, In Banc. No. 21154.]

1. MUNICIPAL CORPORATIONS. *Statute authorizing city to issue bonds for hospital not unconstitutional.*

Laws 1914, chapter 147 (Hemingway's Code, sections 5968-5974), conferring on municipalities operating under Code charter power to issue bonds for various purposes, including hospitals, section 2 providing the amount of bonds shall not exceed seven per cent of the assessed value of the taxable property, unless a two-thirds majority of the qualified electors assent, and then shall not exceed ten per cent of the assessed value, is a legislative regulation of the exercise of corporate power, which limitation may be raised or lowered by the legislature without destroying the charter power conferred in other sections, so that Laws 1918, chapter 290, authorizing a city to issue bonds for the construction and equipment of a hospital on a majority vote, is not violative of Constitution 1890, section 80, calling for provision by general law to prevent the abuse by cities of the power to tax, borrow money, and contract debts, or section 89, providing that thelegislature shall pass general laws under which cities may be chartered etc.

2. STATUTES. *"Corporations" as used in statute defined.*

Ordinarily the term "corporation" as used in a statute means a private corporation.

3. STATUTE. *Act authorizing city bond issue to construct hospital not special or local.*

Laws 1918, chapter 290, authorizing the city of Tupelo to issue bonds for not more than $50,000 for the construction and equipment of a hospital is not violative of Constitution 1890, section

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87, prohibiting any special or local law for the benefit of individuals or corporations is cases providable for by general law, particularly in view of section 89; the prohibition against special or local legislation applying, not to municipal, but to private corporations defined by the Constitution 1890, section 189.

APPEAL from the chancery court of Lee county.

HON. A. J. MCINTYRE, Chancellor.

Suits by Dr. L. C. Feemste against the city Tupelo. From a decree dismissing the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

Mitchell & Bolton, for appellant.

We contend that the act above referred to violates the provision of sections 80, 87 and 88 of the constitution. We believe that section 80 of the Constitution is violated, because the act in question seeks by local law to regulate the taxing power of a municipality. This can only be done by general law.

Our court, in the case of *Turner* v. *Hattiesburg,* held that act of the legislature establishing the Normal College did not violate the provision of section 80 of the constitution, but that the act was not a local law, as it applied to any city in the state which would come under its provisions. This is the only case we have found in point, and we believe this to be an open question and one which our court has never passed upon directly.

If the act in question should be held to attempt to amend the charter of the city of Tupelo, then it would be clear that it violates section 88 of the constitution. If it should be held that the city of Tupelo is a corporation within the meaning of the terms of section 87 of the constitution, then the law in question would be held to this provision of the constitution also.

The bill in this cause raises all the serious questions as to the validity of the special law under which bonds

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are issued in this matter and for the purpose of testing the validity of this law and to obtain the decision of this court as to same, we respectfully submit the matter to the court, and ask that the cause be reversed and remanded with leave to defendant to answer.

Mitchell & Clayton, for appellee.

In this case there are three sections of the constitution of the state of Mississippi, which are involved, viz: section 80, section 87, and section 88. We will take them up in this order.

(1) Section 80, has nothing to do with this case for the simple reason that it is not self executing, and requires legislation to put it into effect. This was decided by the supreme court in the *State Normal College case* in 98th Mississippi, page 337. In that case, the court decided, straight out, that section 80 had not been put into effect by any legislation and held that a special act which allowed the city of Hattiesburg to issue certain bonds, was valid. The court used this argument in that case:

It is argued that, instead of limiting the power of municipalities the legislature has opened wide the doors to extravagance, not only authorizing municipalities to issue bonds without limit, but that it is encouraging extravagance, by providing, in effect, that the location of the school shall be determined by public auction, the municipality obtaining same, which bids the highest amount therefor. This may all be true but this court has determined to remedy the matter.

Section 80 is not self executing. It requires legislation to put it into effect. It is for the legislature to say what constitutes such power of the municipality, and to provide checks thereon. These checks are to be provided by general laws, covering all cases and not a necessity in which every law giving such powers to the municipalities.

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So in this case and in this very act the legislature has provided a check in that it limits the amount which the city of Tupelo may issue for the purpose of establishing a hospital, and also it requires that a majority of the qualified electors shall vote in favor of the issuance of these bonds. We do not see how any better check can be provided than this.

The next objection is that this violates section 87 of the constitution, which is as follows: "No special or local law shall be enacted for the benefit of individuals or corporation, in cases which are, or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law can be enacted."

This does not apply for the reason that it is very clear that this section simply applies to individuals or private corporations, and has no reference whatever to a municipal corporation and as an evidence of the fact that this section simply applies to private corporations, the court will see by examination of the case, of the *Yazoo Railroad Company* v. *Southern Railway Company,*

Section 88 does not apply, because this is not an attempt to amend the charter of the city of Tupelo, or to effect the charter in any way. The city of Tupelo is not operating under a special charter anyway, but is operating under the Code chapter on municipalities. We submit to the court that this whole matter is settled by section 98 of the Constitution. This section provides in substance, as the court will see by inspection thereof, that there shall be appointed in each house of the legislature, a committee on local and private legislation. Every local or private bill must be referred to these

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committees and be referred back by them with a recommendation in writing, etc., and when a local or private bill has been passed by the legislature under the provisions of this section and in accordance with its requirements, then the courts shall not, because of its local, special or private nature, refuse to enforce it. The only restriction upon the power of the legislature to pass local and special bills under this section is that they shall not pass those which are set out in the following section which is section 90, and to which we refer the court.

The court will see by inspection of section 90 that a local or private legislation, which was passed by this law, which allowed the city of Tupelo to issue bonds for a hospital, is not prohibited by such section.

It occurs to us, anyway, that, in view of the fact that, for many years, it has been the custom of the legislature to pass these local and private bills in accordance with the provisions of section 89, and those not in conflict with section 90 goes to show that the legislature certainly had authority to pass such legislation as this. As an illustration of this, we refer the court to the case of *Sick* v. *City of Bay St. Louis,* 113 Miss. 175, in which the court construed chapter 287 of the Laws of 1916, which authorized the city of Bay St. Louis to issue bonds for certain, special purposes, and that case shows that every conceivable point seems to have been raised and certainly if there had been any doubt of the constitutionality of this act, the point would have been raised and have been decided.

We therefore submit that this act, in which these bonds were issued, is constitutional, and the plea of the complainant in this case is without merit.

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ETHRIDGE, J., delivered the opinion of the court.

At the 1918 session of the legislature chapter 290 of the Laws of 1918 was enacted, authorizing the city of Tupelo to issue bonds in the sum not exceeding fifty thousand dollars, exclusive of all bonds heretofore issued and authorized by law for the purpose of raising funds for the construction and equipment of a hospital to be located in the said city, and provided that the bonds should not be issued and the hospital established unless a majority of the qualified electors should vote therefor, and provided for the expenditure of the funds under the direction of the board of mayor and aldermen and empowered the board to receive, purchase, own, and hold real and personal property for the said hospital, and to accept, own, and hold bequests, devises, and donations made to it by individuals, counties, or municipalities, and to use such bequests and donations, etc., as might be best for the said hospital, and to have such powers and perform such things as might be necessary to accomplish the purpose of such hospital. The board of mayor and aldermen was authorized to appoint a board of five trustees to manage such hospital, etc. The board gave notice of its intention to issue fifteen thousand dollars of such bonds to construct such hospital; the resolution of the board reading in part as follows:

"Be it resolved that it is the purpose of the mayor and board of aldermen of the city of Tupelo, Miss., to issue the bonds of the said city of Tupelo in the sum of fifteen thousand dollars or so much thereof as may be necessary for constructing and equipping a hospital located in such city. The above notice is published in accordance with the provisions of section 3415, 3416 3419, and 3420, and such other sections of the Annotated Code of 1906 of the state of Mississippi and such amendments thereto as may have been made and are

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applicable thereto, including the said chapter 290 of the Laws of 1918 aforesaid, for the purpose of notifying the taxpayers of the city of Tupelo, Miss., of the proposed action of the mayor and board of aldermen of the said city, so, if there be any opposition to the issuance of such bonds, it may be presented to the mayor and board of aldermen of such city by counter petition as provided by law on or before the first Tuesday in May, the same being the 6th day of May, 1919," etc.

This notice was published in a paper in the said municipality, but no protest was filed. On the 7th of May, 1919, the board of mayor and aldermen recited that no protest or counter petition had been filed, but, as chapter 290, and also chapter 209, of the Laws of 1918 requires an election regardless of whether any counter petition had been filed, ordered an election to be held on the 7th day of June, 1919, and published notice thereof, and appointed the persons to hold such election. The parties appointed held the election, and a majority of the qualified electors of the city of Tupelo voted in favor of the issuance of the said bonds, and the bonds were issued, sold, and were about to be delivered to a bank which had bid therefor when the appellant sued out an injunction alleging that he was a resident and taxpayer of Tupelo, Miss., and that chapter 290, Laws of 1918, was unconstitutional and void as violating sections 80, 87, and 88 of the state Constitution, and alleging that, unless restrained, the board would deliver such bonds, and that the city of Tupelo was operating under the Code chapter on municipalities, and not under a special charter and prayed that the injunction be granted perpetually enjoining the issuance and delivery of such bonds. The proceedings of the board are made exhibits to the bill. A demurrer was filed to the bill, and was sustained by the court, and the bill dismissed, from which this appeal is taken.

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It is contended by the appellant that chapter 290, Laws of 1918, is a special and local law, and that its enactment is prohibited by the above sections of the Constitution, and that the subject-matter covered by the act can only be enacted by a general law. It is contended that the power granted in this act is an amendment of the charter of the city of Tupelo, which is claimed to have been inhibited under section 88, and also that the city is a corporation within the meaning of section 87 of the state Constitution. The said sections reads as follows:

"Sec. 80 Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations of their powers of assessment, taxation, borrowing money and contracting debts."

"Sec. 87. No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the legislature for the benfit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.

"Sec. 88. The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

It was held in the case of *Turner* v. *City of Hattiesburg,* 98 Miss. 337, 53 So. 681, that section 80 of the Constitution is not self-executing, but needs legislation to put it in force. In that case the city of Hattiesburg was authorized by law to issue bonds of the city to offer as

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an inducement to have the said school there located, but the act there involved authorized municipalities within the state to issue bonds for such purposes, and the act authorizing the issuance of such bonds was a general law, and section 88 was not applicable to nor involved in that suit. The legislature has by general law provided limitations on indebtedness on the part of municipalities in which it is generally provided that such debts shall not exceed ten per cent. of the assessed valuation of property within the city. Chapter 147, Laws of 1914 (Hemingway's Code, sections 5968-5974). The legislature has also provided by general law for chartering municipalities and amending their charters. It is contended here that powers conferred by chapter 290, Laws of 1918, is in effect an amendment to the charter of the municipality, and, inasmuch as Tupelo operates under the municipal chapter, a special and local law could not be enacted to accomplish such purpose; and it is conceded by the appellee that, if the effect of the law (chapter 290, Laws of 1918) is to amend the charter, this could not be done under a special and local law. The power to erect, establish, and regulate hospitals, etc., is provided for in section 5855, Hemingway's Code (section 3358, Code of 1906), in the following words:

"To erect, establish, and regulate hospitals, workhouses, and houses of correction in the corporate limits, or within three miles thereof, and provide for the government and support of the same."

Chapter 147, Laws of 1914, conferred power upon municipalities operating under Code chapter on municipalities and other cities and towns the power to issue bonds for various purposes; clause L of section 1 including hospitals in such grant. So the charter power to establish hospitals and issue bonds for that purpose is given by general law, but the law places a limitation upon the amount of the bonds that may be issued for

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such purposes. Section 2 of chapter 147 contains this limitation and reads as follows:

"The amount of the bonds to be issued, including all outstanding bonds shall not exceed in amount seven per centum of the assessed value of the taxable property of the municipality, unless in an election held for that purpose, a two-thirds majority of the qualified electors voting shall have voted for the issuance of the bonds, but in no case shall the amount exceed ten per centum of the assessed value."

As we construe the law, section 2 is a legislative regulation of the exercise of corporate power, which limitation may be raised or lowered by the legislature without destroying the charter power conferred in the other sections referred to. The exercise of the power may be lawfully made to depend upon conditions, and, while this regulation may limit the power in a particular case, the power is not destroyed,, and it is not in a legal sense an amendment of the charter powers, though it has the effect of restricting the exercises of the power; the exercise of the power in such cases being dependent upon facts, and not law. So in our opinion the act in question does not violate either section 80 or section 88 of the Constitution.

Does the act violate section 87 of the Constitution? This section reads:

"No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable and would be advantageous, no special law shall be enacted."

Does the word "corporations" in the first clause of this section mean municipal corporations, or is the

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meaning limited to private corporations? The term "corporation," as used in the chapter on corporations in the Constitution, is defined to mean all associations and joint-stock companies for a pecuniary gain have privileges not possessed by individuals or partnerships. The chapter on corporations is article 7 of the Constitution, but sections 80, 87 ,and 88 are in article 4 of the Constitution.

Does the word "corporation" in section 87 mean a different thing from what the word "corporation" does in article 7, section 199? Section 199, article 7, defines corporations "as used in this article" to mean "all associations and all joint-stock companies for pecuniary gain having privileges not possessed by individuals or partnerships." What is the significance of the expression "as used in this article?" Ordinary the term "corporation" means private corporation. See *Sherman County* v. *Simonds,* 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093; *Landowners* v. *People,* 113 Ill. 296, 314; *Y. & M. V. R. R. Co.* v. *Leevee Com'rs* (C. C.), 37 Fed. 24; *State* v. *District of Narragansit,* 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; *State* v. *Caffery,* 49 La. Ann. 1748, 22 So. 756, 759, 1008; *Electric Medical College Ass'n* v. *Shrader,* 87 Iowa, 659, 55 N. W. 24, 27, 20 L .R. A. 355, 359.

We think the purpose of section 87 was to prevent local and special laws for such corporations as were not public in their nature. The legislature has usually exercised full control over municipal coroporations; the functions of both a municipal corporation and the legislature being entirely public in their nature. The question here presented seems to turn, however, on the second or latter part of section 87, prohibiting the suspension by the legislature of any general law for the benefit of an individual or a private corporation. The effect of chapter 290 may be to suspend the general law contained in chapter 147, Laws of 1914 (section 5968,

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Hemingway's Code), but the prohibition applies to private and not municipal corporations. This construction, that the statute is constitutional, so far as the present controversy is concerned, is strengthened by section 89 of the constitution, which provides for a committee of each house on local and private legislation, and provides that all local and private bills shall be referred to such committee and "reported back with the recommendation in writing that it do pass, stating affirmatively the reasons therefor, and why the end to be accomplished should not be reached by a general law, or by a preceeding court," etc., the concluding clause of which section provides:

"If a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section, the court shall not, because of its local, special or private nature, refuse to enforce it."

Whatever mischief may lie in the passing of special bills or laws of the kind here involved (and it may be conceded that such acts are not wholesome as a rule), the Constitution in the section last quoted vests in the legislature, and not in the court, the function of deciding this question, and we cannot refuse to enforce any law because merely in our judgment a general law would be better than a special one. The legislature has been recognized by the constitution makers as being the best equipped to deal with the wisdom of enacting special laws rather than general laws, except in cases specifically provided for in the Constitution. We think the act is not in conflict with section 87 in such sense as to make it void and unenforcible in the courts.

There is no suggestion in the bill that the general limitation imposed by chapter 147 is in fact violated; the bill being totally silent about the amount of outstanding bonds and indebtedness and the value of assessed property in such municipality, and it does not appear clearly and certainly that the limitations fixed in the statute last

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referred to have been exceeded in the present case. In view of what we have already said, it is unnecessary to decide whether the legislature can by a special act amend the powers conferred on cities and towns operating under the Code chapter. In *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, it was held by the court, speaking through Judge Whitfield, that section 88 of the Constitution did not require that each municipality have the same powers. That case involved an amendment to a special charter which was held to be authorized, though the Code chapter did not confer similar powers on other municipalities. Likewise the case of *Sick* v. *City of* Bay St. Louis, 133 Miss: 175, 74 So. 272; both of the cities involved in these cases being cities under special charters, and not under the municipal chapter of the Code.

The judgment of the court below will be affirmed.

Affirmed.

ST. PAUL FIRE & MARINE INS. CO. v. W. H. DANIEL AUTO COMPANY.

[83 South. 807, In Banc. No. 20906.]

PARTIES. *Plaintiff must have legal title of choses in action at institution of suit.*

Plaintiff, in a court of law, in order to maintain a suit upon a chose in action must have the legal title to the same at the time he brings his suit and where the evidence showed that he did not acquire the title until two days after the suit was brought, the court should have given a peremptory instruction for the defendant.

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APPEAL from the circuit court of Harrison county.

HON. CHAS. L. RUSHING, Judge.

Suit by W. H. Daniel Auto Company against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiff defendant appeals.

The facts are fully stated in the opinion of the court.

R. L. McLaurin, for appellant.

Under the head of "First: The date of the assignment," counsel for appellee discusses our assignment of error to the effect that the record shows without dispute that at the date of the institution of the suit herein, September 7, 1918, there was no right of action in the plaintiff appellee here.

Counsel then says that this point was not made in the lower court "for the simple reason that counsel knew it could be met there instantly."

A request for peremptory instruction as we have always understood it, searches the whole record, and certainly it would search the record to the extent of calling the attention of the court to the fact that the record showed that there was no right of action in the plaintiff when the suit was filed.

The fact is, and counsel will not deny it, that this question was debated before the court at the time the peremptory instruction was refused. It can hardly be said to be a question that was debated, as there is but one side to it. The court below overruled in open court the several peremptory instructions as shown by the record, and in doing so held: "That the assignment of the contract before suit was filed was not necessary," a decision which at least possesses the charm of novelty.

Appellees second proposition is: Second: "A further reason to say there is nothing in the proposition is that the assignment was not at all necessary to the

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maintenance of the cause of action." In support of this proposition counsel for appellee cites the language of the writer in his brief in the Stewart case.

The court will quickly perceive the difference in the facts in the two cases. In the Stewart case and in the several other cases cited by counsel in this connection there was in every policy therein involved either a full mortgage clause of the form provided by statute and commonly known as the "Union Mortgage Clause" or the "Standard Mortgage Clause" or a "Loss Payable Clause" in favor of the mortgagee.

In this case the mortgagee, Daniels, or the party who held the vendor's lien notes which this court has held is equivalent to a mortgage, had no policy runnng directly to him, nor did he have a mortgage clause or a loss payable clause inserted in the policy here, in question which was made payable to Thurman, the vendee of the automobile which was burned.

There is no pretense that such was the case, and the record shows affirmatively that the rights of the Daniel Auto Company, whatever they are, are bottomed entirely on Thurman's assignment to Daniels, and the right of action herein sought to be availed of is based on said assignment. This right of action was dated and acknowledged September 9, 1918, while the suit was filed September 7, 1918.

Counsel in his brief, page 3, says: "It will be seen from reading the assignment, it is nothing more than a quit claim of any interest Thurman might have had in the policy which he did not know had ever been taken out, but which he was informed by Daniels would be taken out for Daniels."

We hope the court will bear that part of this statement in mind, that is, "which he did not know had ever been taken out."

The record sustains this fact, and it shows that the mind of the parties never met and therefore there could

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never have been created the contract here sued on or the document here sued on which is claimed to be a contract, for the contract was not valid and we think we have demonstrated this fact in our original brief, that Thurman had nothing he could assign.

But let us return. In the next line counsel for appellee in his brief said: "But which he was informed by Daniels would be taken out for Daniels." That is, appellee here claims that Thurman says that he was informed by Daniels that he, Daniels, would take out insurance "for Daniels." The court will look in vain for any such statement in the testimony of Thurman or in other testimony to be found in this record.

Counsel contends that it was not necessary for the contract sued on to have been in writing, and contends that a parole assignment would be sufficient, citing Joice on Insurance, sec. 2322, and *Blewett* v. *Maryland Insurance Co.* Fed. Cases No. 1321. We have not had access to this authority, but we are content to stand on the statute in this state and the decisions in his state already cited in our recent brief. See Hemingway's Code, secs. 496 and 497.

We cannot take issue with counsel as to what appellee would have shown if objection would have been made. This court will deal with the record as it is, not with what it would have been. We imagine. We confess our inability to understand just what section 808, Code of 1906, the Statute of Jeofails, section 718, Code of 1906, the right of assignment of a chose in action after suit has been filed, or section 722, Code of 1906, nonjoinder and other matters cited by plaintiff have to do with this case.

Surely counsel for appellee just here must be hard pushed. We will not debate the question of the case previously cited to the effect that plaintiff must be in possession of a right of action when the suit is filed in order to maintain suit being obsolete. We cited cases

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old and new. None of them have ever been overruled that we are able to discover. We agree that "appellant will never have to pay Thurman over again," nor should he, under his assignment, ever be paid anything under this contract in the first instance.

We insist that the judgment of the lower court in this case should be reversed and judgment here entered for defendant.

White & Ford, for appellee.

First: The date of the assignment. This was not raised in the lower court for the simple reason that counsel knew it could be met there instantly; a further reason to say there is nothing in the proposition, is that the assignment was not at all necessary to the maintenance of the cause of action. It is true Mr. McLaurin says in his brief in this case that the mortgagee cannot sue and that the assignment of the policy was necessary, but how different his statement in a recent hard fought case in this court where he says that: "It is settled by the decisions of this court that (the right of the mortgagee under the policy) constitutes a separate and independent contract, a contract, upon which the mortgagee can maintain a separate action without the advice, consent, or assistance in any manner whatever of the original assured." See his brief on suggestion of error in *Stewart* v. *Coleman & Company,* 81 So. 653.

It cannot be said that the policy need specifically make it payable to the mortgagee because section 2596 takes care of that part of it. *Bacot* v. *Insurance Co.,* 96 Miss. 223; *Insurance Co.* v. *Lumber Co.,* 116 Miss. 836; Joyce on Insurance, sec. 1031, and extensive note.

The declaration charges that the policy was taken out to protect Daniels Auto Company and Thurman. The assignment from Thurman was obtained for the pur-

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pose of preventing technical objections being raised but it seems to have increased them. It will be seen from reading the assignment, it is nothing more than a quitclaim of any interest Thurman might have had in the policy, which he did not know had even been taken out, but which he was informed by Daniels would be taken out for Daniels.

Now as a matter of pleading, if this discrepancy in dates was a material defect, a demurrer should have been filed; no objection was made to the character in which plaintiff sued, whether as assignee or not, no plea in abatement was filed; it was offered in evidence without the slightest objection, in addition to being made an exhibit to the declaration. Counsel knew the objection could be at once met by amendment, or if necessary by nonsuit, but he chose to set a trap, to seek to get the benefit of such a defense without its consequences. It is not necessary that such an assignment be in writing. Joyce on Insurance, sec. 2322; *Blewett* v. *Maryland Ins. Co.,* Fed. Cases No. 1321.

Therefore, if objection had been made we could have shown an oral assignment. Counsel cite some cases where promissory notes were sued on, the plaintiff not having acquired the note at the time of suit, and having no interest therein and the court held that proper objection having been raised at the proper time, the cause was not maintainable. These are old, obsolete cases, decided under the common law, when every failure to dot an "i" or cross a "t" was fatal. We submit the proposition is without merit. Secs. 808, 718, 722, Code 1906, and cases cited under these sections.

We respectfully submit that the cause should be affirmed.

COOK, J., delivered the opinion of the court.

Inasmuch as we have reached the conclusion that this case must go off on one assignment of error, we deem

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it unnecessary to state the detailed pleading and evidence presented to the trial court.

The suit is based upon an alleged assignment of a certain fire insurance policy to the Daniel Auto Company. It appears that the appellant, a fire insurance company, wrote a policy insuring a certain Maxwell automobile and its extra equipment. The property insured was consumed by fire and Thurman, the owner, assigned his claim to the appellee. Appellee brought a suit against appellant on the alleged assignment. The declaration was filed September 7, 1918. The assignment of the policy was made on September 9th, two days after the suit was instituted. No special plea was filed to the declaration, but when the evidence was all in the defendant insurance company asked the court to instruct the jury to return a verdict for the defendant. This instruction was asked upon the theory that the evidence showed conclusively that the plaintiff did not own the right of action at the time the suit was instituted. So the precise point for our decision may be stated this way:

Was the right of action in the plaintiff when the suit was filed, and, if not, could this point be availed of by the request for a peremptory instruction under the general issue alone?

It seems clear enough that the plaintiff in a court of law, in order to maintain his suit, must have the legal title of the chose in action at the time he institutes his suit. This principle is axiomatic. The evidence must affirmatively show this fact. It would not be contended that the plaintiff could recover when it appears that he had transferred the chose in action before the trial. In the present case the evidence conclusively established the fact that the plaintiff acquired the chose in action on September 9th, and the record discloses that the suit was begun two days before this date. In this state of the record a peremptory instruction should have

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been given directing a verdict for the defendant. *Eckford* v. *Hogan*, 44 Miss. 398; George's Digest, title, Action, p. 4.

Other questions are presented by the record, but as the point discussed puts the plaintiff out of court we do not think it necessary to discuss them.

Reversed and remanded.

LYNCH v. LYNCH.

[83 South. 807, In Banc. No. 20967.]

1. DEEDS. *Delivery necessary to pass title.*
   In a suit by a father to cancel a deed of gift to his son, it was incumbent on the son to show that the deed had been delivered to him before he could succeed in the litigation.

2. DEEDS. *Presumption of delivery from record disappears on showing no delivery.*
   The presumption of delivery of a deed arising from lodging it for record disappears on a showing that the deed in fact was never delivered and that it has been in the grantor's possession ever since it was signed and acknowledged, except when in the possession of the clerk of the chancery court for record.

3. DEEDS. *Intention to deliver does not dispense with manual delivery.*
   An intention to deliver a deed does not dispense with delivery, there must be an act showing a delivery.

APPEAL from the chancery court of Hinds county.

HON. LAMAR F. EASTERLING, Chancellor.

Suit by Fred Lynch, Sr., against Chas. A. Lynch. From an adverse decree, complainant appeals.

The facts are fully stated in the opinion of the court.

Teat & Potter, for appellant.

The grantor in the purported deed of gift has testified fully to all other facts touching the execution, the re-

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cording of it, and of his withholding the delivery and the reasons why that he did not deliver it, and stated that he did not intend to deliver the deed unless he should find himself in a very precarious condition of health, and believe that his death would follow immediately. The grantee, defendant below and appellee here, likewise took the stand and testified that he did not know that the deed was made, had not seen it, that it was not delivered to him, and he staked his case upon the recording of the said deed by the grantor as a sufficient delivery to him. This court in its opinion upon this case, used the following language. "His whole case rested and rests upon the presumption of delivery by the recording of the deed. This presumption disappears when it is shown that the deed was never delivered; that it has been in the possession of the appellant ever since it was signed and acknowledged, except the time it was in the possession of the clerk of the chancery court.

Something has been said about the intentions of the parties, whatever that may mean. The intention to do a thing will not suffice. An intention to deliver a deed does not dispense with delivery—there must be an act showing a delivery. The only act proven which tends to show a delivery was the record of the deed this raised a presumption but the presumption yields to the fact that the deed was never delivered. It never passed out of his possession or out of his control. There is no dispute about that. Besides, he testified that he never intended to deliver the deed, unless he got sick. Evidently he purposely held on to the deed, with a purpose to destroy the same when he regained his health."

It will therefore be seen that this is one case in which there is no matter of fact in consequence of the decision of this honorable court to be ascertained by the court below. The grantor having taken the stand and under oath to state the whole truth about the execution and delivery of the deed and that having been ad-

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judged by this court that he did not deliver the deed, defendant below and appellee here, having taken the stand and under oath to tell the whole truth, testified that the deed had never been delivered to him, and that he never saw the deed until the day of the trial in the court below, and having rested his case upon the presumption of delivery by recording of the deed, there remains no matter of fact which he could testify about this matter in the court below if the cause is remanded. The sworn testimony having thus been presented and this court having held that no delivery of the deed was made, about which there was no dispute in the court below and the matter of delivery resting solely upon the presumption of law from the recording of the deed and this having been by this honorable court decided against the appellee, there can be no other matter of fact to be determined by the court below. And upon this record it appears to be conclusive that the judgment here should be entered finally determining this lawsuit.

Brunini & Hirsch, for appellee.

As to whether there was a delivery of the deed presents an issue of fact. "Some courts have stated broadly that delivery is a question of fact. Taken literally, however, this declaration is, perhaps, too sweeping, as ignoring the occasional instances in which the undisputed facts establish delivery as a matter of law, and strictly speaking, the question is rather one of mixed law and fact, for from the detail of facts established, the legal conclusion must be drawn, though, since the jury usually must find a delivery or not, or else the circumstances from which the court may draw its conclusion, the question may properly be denominated, as has been done in a number of cases, largely one of fact, being so much so indeed that the decision of the lower court is conclusive unless the specific facts found conclusively establish the contrary." (8 R. C. L. 976.)

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Upon this authority we humbly submit that the decision of the learned chancellor is conclusive on the question of delivery, that therefore, this opinion must necessarily be affirmed.

"There is no universal test, applicable to all cases, whereby the sufficiency of delivery can be determined, and it is impossible to state in exact terms what shall or shall not constitute a delivery; wherefore, whether the facts relied on to establish a delivery in a particular case are sufficient for that purpose is often a difficult question. Indeed, it has well been said that an arbitrary rule ought not to be laid down." (8 R. C. L. 976-977.)

It was from all the facts and circumstances of the case that the chancellor based his decision. The Cardinal rule in determining the question of delivery is: What was the intention of the grantor? (8 R. C. L. 978.)

In fact our own court, in *Hall* v. *Barnett,* 71 Miss. 37, has held: "Delivery is a question of intention and it is deducible from all the circumstances of the transaction."

"Delivery may be inferred from the fact of acknowledgment. Likewise, the fact that a deed is on record is *prima-facie* evidence of delivery, or, as otherwise stated, warrants a presumption of delivery and acceptance, so that whoever makes assertion to the contrary has the burden of proving it. Moreover, since recording takes the place of the solemn ceremonies accompanying livery of seizin at common law, it has been called evidence of delivery of the most cogent character, requiring the countervailing proof to be clear and persuasive." 8 R. C. L. 1004. On these questions the case of *Buck* v. *Garber* (Ill.), 103 N. E. 1059, is in point. *Baker* v. *Hal,* 214 Ill. 364, 73 N. E. 351; *Reigel* v. *Reigel* 243 Ill. 626, 90 N. E. 108; *Prince* v. *Prince,* 258 Ill. 304, 101 N. E. 608; *Hill* v. *Kreiger,* 250 Ill. 408, 95 N. E. 468; *"Valter* v. *Blavka,* 195 Ill. 610, 63 N. E. 499; *Cribbs* v. *Walke,* (Ark.), 85 S. W. 244; *Blakemore* v. *Byrnside,* 7 Ark.

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505; *Srugham* v. *Wood,* 15 Wend. 547, 30 Am. Dec., 75; *Turner* v. *Warren,* 160 Pa. 342, 28 Atl. 781; *Cummings* v. *Glass* (Pa.), 29 Atl. 848; *Allen* v. *Hughes,* 106 Ga. 785, 32 S. E. 927; *Wall* v. *Wall,* 30 Miss. 97, 64 Am. Dec. 147."

So we confidently affirm that the retention of the deed by appellant and his exercise of complete possession of the property, and the failure of appellee to exercise any rights of possession are not in the slightest inconsistent with the deed of the grantor reserving title, but on the other hand are absolutely consistent with it.

In the case of *Wall* v. *Wall,* 30 Miss. 91, the grantor executed an instrument of writing, that is, signed and acknowledged it, but did not record it, which this honorable court held to be a valid deed to the grantor's brothers and sisters, adults, reserving a life estate in the grantor.

"This being a voluntary settlement, and the rights of creditors or subsequent purchasers not being involved, the mere fact of the maker's retaining the instrument in his own keeping, intending that it should be considered as executed and delivered, will not render it invalid for want of delivery. *Clavering* v. *Clavering,* 2 Vernon, 473; *Souverbye* v. *Arden,* 1 Johns Ch. Rl. 256; 1 Jarman on Wills, 11; *Doe* v. *Knight,* 5 Barn. & Cres. 671. And as to the point of acceptance, that will be presumed from the fact that the settlement operates entirely to the benefit of the donees." *Metcalf* v. *Brandon,* 60 Miss. 685; *Young* v. *Elgin,* 27 So. 595.

On the question of delivery and acceptance the principles announced in the case of *Sullivan 1. Sullivan* (Ky.), 201 S. W., 24, are illuminating. *Commonwealth* v. *Jackson,* 10 Bush. 424; *Thompson* v. *Dearborn,* 107 Ill. 87.

In the instant case appellant made a deed of settlement, not one of bargain and sale, and while he did not mention that he had made a deed, he practically told ap-

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pellee that he had done so, and appellee within a few weeks thereafter learned of its existence, which, taken with all the surrounding circumstances, shows a delivery, acceptance and assent of appellee, and the learned chancellor so held: "Where, however, the grantee, though having no knowledge at the time, of the deposit for registration, by the grantor, subsequently assents to the act, the delivery is deemed complete, and it has been declared that the delivery is complete unless the grantee subsequently dissents." 8 R. C. L. 1008, 1009, 1010, 1011, 1017, 1018.

The case of the *Franklin Insurance Company* v. *Friest,* 68 N. E. 188, is readily distinguished from the case at bar. The facts in that case were that the grantor had no knowledge that the deed had ever been made, signed or recorded until long after the destruction of the property by fire, and after the grantor did not intend to deliver the deed. The court in that case held that the question of delivery is to be determined by the court and the jury, and that if the deed is *recorded* by the grantor, delivery will be presumed, but that the presumption may be overthrown.

There is no war to be made with the announcements of the law in that case. The facts in that case with the one at bar differentiate them. The case of *Cravens* v. *Rossiter,* 1166 Mo. 338, announces principles of law recognized throughout the decisions we have submitted. The question from 2 Jones on Real Property, 1289, states the law accurately. It is just that for which we have been contending, and because it is absolutely in accord wherewith, we again quote it.

A delivery may be inferred from the fact, among others, that after the instrument was completed, the grantor put it of record. But this is not conclusive of delivery. Recording alone does not constitute delivery, and generally it may be said that the recording of a deed by the grantor, without the knowledge of the

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grantee or without other circumstances does not amount to a delivery."

So it will be seen that Mr. Jones announces the law to be that the delivery may be inferred from the recording of the deed; that this inference is not conclusive; that the recording alone does not constitute delivery, and that if recorded by the grantor, without the knowledge of the grantee it does not amount to a delivery but becomes the qualifying clause "without other circumstances." The court will note these qualifying clauses throughout the decisions reviewed by appellant.

The case of *Maynard* v. *Maynard,* 10 Mass. 462, appellant states that this case is "on all fours" with the instant case, and that the principles therein announced control in this case.

In that case the grantee was never present at any of the transaction involved in the execution of the deed, and he did without even knowing of the execution, or existence, of the deed, and besides that, the grantor made known to the scrivner that it was his intention to keep control over the deed until he should be more determined upon the subject. He retained the deed and of course, under those circumstances the grantee, having died without any knowledge of the existence of the deed, the court properly held that there was no delivery. Now look at the announcements in the case of *Weber* v. *Christen,* 12 Ill. 97, 11 N. E. 893, cited by appellant as in point, and sustaining his position in this case. Instead of holding with appellant it holds with the contention of appellee.

In the case of *Insurance Company* v. *Campbell,* 95 Ill. 279, the grantee never knew that a deed had been made to him until after the death of the grantor and when asked about it by the grantor's wife, after the death of her husband. The grantee never paid anything for the execution of the deed in the lifetime of

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the grantor. These are not the facts of the case at bar.

The case of *Jackson* v. *Phipps,* 12 Johns 418, announces a principle of law not at all inconsistent for what we are contending. The facts and principles announced in the case of *Young* v. *Guilbeau,* 3 Wall, 641, are not at all at variance. The case of *Herbert* v. *Herbert,* Breese, 344, appellant not having given the volume, is another one of those cases where the grantee had absolutely no knowledge of the existence of the deed, and where it was found by the administrator after the death of the grantor among his papers.

The case of *Wiggins* v. *Lusk,* 12 Ill. 1366, continues to announce the principles of the case for which we have been contending. The case of *Richard* v. *Walker,* 39 Ill. 413, is another one cited by appellant, but he says that this is a most favorable one to appellee.

The case of *Bogard* v. *Barkam,* presents facts clearly, distinguishing it from the case at bar. There was an effort on the part of the son and his mother to defeat specific performance of a contract to a third party. The case of *Young* v. *Guilbeau,* is cited for a second time by appellant on page 26 of this brief. This has already been reviewed by ourselves. We shall not take the time of the court upon a further discussion of the same.

We conclude this case by again copying the opinion of the learned chancellor on this point, and this court will observe how well the chancellor has stated the facts, as well as the law in the case.

COOK, J., delivered the opinion of the court.

The appellant, the father of the appellee, exhibited his bill of complaint in the chancery court of the First district of Hinds county, praying for the cancellation of a certain deed of gift heretofore signed and acknowledged by complainant and recorded in the office of the clerk of the chancery court.

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This deed, by its terms, conveys certain described lands to the appellee and reserves to the grantor a life estate in the lands.

The sole question presented by this record is whether or not the deed from appellant to appellee was ever delivered to appellee. There is no evidence tending to show that the deed was manually delivered to the grantee, or to any one for him except the recording of the deed upon the records of the county. The evidence shows that the deed has always been in the custody of the grantor except the time elapsing between the delivery of the deed to the clerk for record and redelivery of same to the grantor after it had been recorded.

The appellant testified that he did not intend to deliver the deed unless he got sick.

A brief statement of the undisputed facts will make clear the law of the case. The appellant was advised by his physician that he was in a rather serious condition physically; that he had vertigo and might at any time fall down a stairway and kill himself; and suggested that it would be wise for him to make a will, or in some way provide for the disposition of his property in case he should die. Acting upon this suggestion, he consulted a lawyer, and acting upon his advice he executed the deed now in question, conveying the land to appellee, but reserving a life estate in himself.

The grantee knew nothing about the purposes and action of his father before the deed was executed and recorded. It appears, however, that he did hear some time afterwards that his father had made some disposition of his property. He testified that, having heard that his father had made some disposition of his property, he went to see him about it. We quote from the record that part of appellee's testimony referring to the deed in question, viz.:

"I said, 'Papa, I came over here to-day to see you and ask you,' I said, 'what are you going to do for me.

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You gave Fred,' I said, 'or sold him, all this Country Club property, and mother gave him that seventy-one acres where the homestead is, and you ain't gave me a thing at all,' and he said: 'You just go ahead on home and rest easy; I have made everything all right for you.'

"Q. Did he tell you what he had made all right for you? A. No, sir; he did not."

The learned chancellor entered a decree denying the relief sought. The concluding paragraph of the decree embodies the views and judgment of the chancellor in these words:

"I therefore am of the opinion that it was the intention of the grantor to part with the title at the time of the execution of the deed, and that his delivery of the same to the clerk for recordation, and the lapse of time it was allowed to remain of record before filing of this suit, and the fact that he at no time before the filing of this suit expressed any purpose or desire not to deliver the same, and all the other facts and circumstances, fail to rebut the presumption of delivery raised by the acknowledgment and filing of the deeds for record.

"The decree of the court will be that the bill be dismissed at the cost of complainant."

It will be seen that the chancellor based his conclusions upon the failure of the appellant to express any purpose or desire not to deiver the deed until he filed this suit. As we view the law, it was incumbent upon the appellee to show that the deed had been delivered before he could hope to succeed. His whole case rested, and rests, upon the presumption of delivery by the recording of the deed. This presumption disappears when it is shown that the deed was never delivered; that it has been in the possession of the appellant ever since it was signed and acknowledged, except the time it was in the possession of the clerk of the chancery court.

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Something has been said about the intentions of the parties, whatever that may mean. The intention to do a thing will not suffice. An intention to deliver a deed does not dispense with delivery; there must be an act showing a delivery. The only act proven which tends to show a delivery was the record of the deed. This raised a presumption, but the presumption yields to the fact that the deed was never delivered. It never passed out of his possession or out of his control. There is no dispute about that. Besides, he testified that he never intended to deliver the deed unless he got sick. Evidently he purposely held on to the deed, with a purpose to destroy the same when he regained his health.

The case of *Hall* v. *Barnett*, 71 Miss. 41, 14 So. 732, is strikingly similar to the instant case. Aside from the sworn statement of the appellant, the facts of this case strongly suggest that the intention of the appellant was not to deliver the deed, but to destroy it, unless he became satisfied that his death was near.

In the many authorities cited by the appellees, we find nothing inconsistent with our views of the law of this case. The books are full of cases wherein it is held that the recording of a deed of conveyance raises a presumption of delivery, but no case can be found wherein the presumption thus raised does not yield to the facts.

Reversed and remanded.

CAROTHERS v. STATE.

[83 South. 809, In Banc. No. 21072.]

1. BURGLARY. *Not necessary for indictment that intent to commit larceny was burglarious.*

An indictment for burglary charging that defendant did unlawfully, willfully and feloniously and burglariously break and enter

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a certain dwelling was sufficient; it was not necessary to further use the word "burglarious" in charging an intent to commit larceny; the word having reference to the manner of entry and characterizing the breaking and entry as having been done in the manner of a burglar.

2. CRIMINAL LAW. *Confessions made to an officer without caution or warning admissible in evidence.*

Confession of an accused made to an officer having him in custody were not incompetent because the officer failed to caution the prisoner that his statement might be used against him, there being no statute requiring such caution or warning.

3. CRIMINAL LAW. *Erroneous statement of law in argument not prejudicial not included in instructions.*

A statement by a prosecuting attorney in his closing argument in a prosecution for burglary that "possession of recent stolen goods is prima-facie evidence of guilt, and that I could obtain an instruction from the court to that effect," although a misstatement of the law, was not prejudicial to the accused; the error complained of not appearing in any instruction of the court.

APPEAL from the circuit court of LaFayette county. HON. C. LEE CRUM, Judge.

McKinly Carothers was convicted of burglary and appeals.

The facts are fully stated in the opinion of the court.

L. C. Andrews, for appellant.

The defendant was never warned that what he should say would be used against him. The indictment is bad and, therefore, fatally defective in not charging that the intent to steal, take and carry away certain personal property was a burglarious one.

In *Draughn* v. *State,* 76 Miss. 574, 25 So. 153, the court said: "An indictment is bad which only charges the defendant with breaking and entering a dwelling house with intent to commit larceny therein. It should allege the breaking and entry to have been with intent to burglariously and feloniously take and carry away property."

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We consider this case conclusive as to the point here raised. We think that in order to give the confessions introduced in evidence here that degree of fairness and freeness that the law exacts to make them voluntary, that under the circumstances disclosed by this record, the defendant should have been warned that what he was about to say would be used against him on the trial of his case.

From the above premises, the conclusion is irresistable that the indictment contains no valid charge against the defendant, and that the verdict is contrary to the law and the evidence, and that the confessions are inadmissible.

N. T. Currie, for appellee.

The indictment is based upon section 1068 of the Annotated Code of Mississippi 1906, and reads as follows: "Every person who shall be convicted of breaking and entering any dwelling house, in the day or night, with intent to commit a crime, shall be guilty of burglary and be imprisoned in the penitentiary not more than three years."

This statute modifies the common law in this, in that under the common law one of the essential elements of the crime of burglary is the intent to commit a felony. It is perceived from the mere reading of this statute that the breaking and entering of a dwelling house in the day or nighttime need not necessarily be with intent to commit a felony but is burglary with intent to commit "a crime" and we take it that these words mean any sort of a crime.

The statute having made this change, it was not necessary as a matter of law, in the case at bar that the indictment charge that the house was broken and entered by the appellant with the intent at the time of committing a felony, and the indictment charging that

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he unlawfully and feloniously and burglariously broke and entered the house in the nighttime with intent to steal, sufficiently charges the offense of burglary under the statute. The indictment, therefore, was not demurrable.

In his fourth assignment of errors, as originally filed the appellant stated there was an error on the part of the trial court in the admitting, over objection of the appellant, evidence of alleged confessions made by himself to the witnesses, Reagan and Whitehead. He contends that it was not shown that his confessions were voluntary and that it affirmatively appears upon the face of the record that he was under arrest, in the custody of the deputy sheriff, and probably in jail at the time of the making of the alleged confessions. We submit that there is no fact or circumstance in the record which shows, or tends to show, as a matter of law, that the confessions introduced were not voluntary. On the contrary, the testimony of both Reagan and Whitehead the deputy sheriff, is to the effect that there was no threat of violence, no persuasion, no enticing, no giving of reward, no promise of reward, and no hope of pardon or clemency or leniency of any sort offered or held out to the appellant that he was simply asked about breaking and entering into the house and what he knew about it and what goods, if any, were stolen and carried away, etc.

In answer to the contention that the confession is not admissible because the appellant was, at the time, under arrest and, perhaps, in jail, we cite paragraph 129 at page 249 of Underhill on Criminal Evidence, which reads as follows: "The mere fact that the defendant was under arrest, or was in the charge of an armed police officer when he made his confession or was handcuffed and chained or tied, if he is not tied in such a manner as to produce pain or extort a confes-

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sion, or in prison, will not make a confesion involuntary."

The next point of objection they make to the confession is that the appellant was not properly warned or cautioned before making the confession. In reply to that contention and objection, we cite paragraph 130 at page 251 of Underhill on Criminal Evidence, which reads as follows: "Aside from the statute, the fact that a confession, which is otherwise admissible, is made without the accused having been cautioned by the court or by the person to whom the confession is made that what he says may be used against him, does not render it incompetent."

There is no statute in the state of Mississippi requiring the accused, who is about to make a confession, to be cautioned or warned, before he proceeds to make the same, that it may or will be used against him.

We believe the only other assignment of error is that contained in the additional or supplemental assignment of errors and is to the effect that the district attorney in making his closing argument, made use of the following language: "Possession of recent stolen property is *prima-facie* evidence of guilt and that I could obtain an instruction from the court to that effect."

We submit that there is nothing in these remarks to warrant a reversal of this case; indeed, that it was a mere argument and did not prejudice the appellant. The state did not ask for any such instruction, and no such instruction was granted by the court, and there can, therefore, be no legal error based upon these remarks. The court in granting the instructions defined the law, and the jury, no doubt, were advised and understood that they were bound by the written instructions actually granted by the court.

We respectfully submit that there is no reversible error in this case and that the same ought to be affirmed.

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STEVENS, J., delivered the opinion of the court.

Appellant was indicted and convicted of burglary and sentenced to the penitentiary for two years. On this appeal he contends that the indictment is fatally defective; secondly, that certain confessions were improperly admitted in evidence; thirdly, that the verdict is contrary to the law and the evidence; fourthly, complaint is made of the following language used by the district attorney in his argument:

"Possession of recent stolen property is *prima-facie* evidence of guilt, and that I could obtain an instruction from the court to that effect."

The indictment is drawn under section 1068, Code of 1906 (section 796, Hemingway's Code), which reads as follows:

"Every person who shall be convicted of breaking and entering any dwelling house, in the day or night, with intent to commit a crime, shall be guilty of burglary, and be imprisoned in the penitentiary not more than ten years."

The main averments of the indictment are as follows: "The grand jurors . . . on their oaths present that McKinly Carothers, late of the county aforesaid, on the —— day of ——, 1919, in said county, did then and there, in the nighttime, unlawfully, willfully, feloniously and burglariously break and enter the dwelling house of N. L. Ragan by then and there breaking and entering said house at and through a certain window in said house in which said house there was then and there in store kept certain goods, wares, merchandise, and household effects for use, etc., with then and there the unlawful, willful, and felonious intent of him, the said McKinley Carothers, to then and there unlawfully, willfully, and feloniously take, steal, and carry away a portion of said goods, wares, merchandise, and household effects, against the peace and dignity of the state of Mississippi."

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A special bill of exceptions was taken to the quoted language of the district attorney. It appears that the court overruled the objection of the defendant. Dr. Ragan, whose dwelling house was entered by the defendant, testified, among other things, to certain statements which the defendant made after the defendant had been arrested and while he was on the way to jail. Mr. Whitehead, a deputy sheriff and jailer, likewise testified to the same confessions. These witnesses testified that the confessions of the accused were free and voluntary, and were not induced by any promise or flattery of hope, but appellant contends that he was not warned that the confession would be used against him. The indictment was not demurred to, but in the motion for a new trial it is contended that the indictment fails to use the word "burglarious" in charging the intent to commit larceny; that it is necessary to charge that the intent was both felonious and burglarious, and for this reason the omission is one going to the very essence of the offense, and accordingly condemned by *Cook* v. *State,* 72 Miss. 517, 17 So. 228, and *Draughn* v. *State,* 76 Miss. 574, 25 So. 153.

Is the indictment fatally defective? It was permissible, and it is frequently the practice, to charge in an indictment for burglary an intent the goods and chattels of the householder feloniously and burglariously to take, steal, and carry away. Bishop's New Criminal Procedure, vol. 2, par. 145; *Moseley* v. *State,* 92 Miss. 250, 45 So. 833.

We are of the opinion, however, that the failure to use the word "burglarious" in charging an intent to commit larceny does not render an indictment under our statute fatally defective. It will be observed that the indictment in this case does charge that the defendant did unlawfully, willfully, feloniously, and burglariously break and enter. The word "burglarious" primarily has reference to the manner of entry; it characterizes

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the breaking and entry as having been done in the manner of a burglar. If the indictment, therefore, charges, as the present one does, that the breaking and entry was unlawful, willful, felonious and burglarious, it is only necessary to add the intent to commit a crime, and in doing so to specify and set forth the particular felony intended to be committed. The case of *Draughn* v. *State,* 76 Miss. 574, 25 So. 153, apparently holds that the defendant must intend "feloniously and burglariously to take and carry away." It should be observed that the proof in that case showed that the house entered was not a dwelling house, but a crib or smokehouse, and there was a fatal variance between the indictment and the proof. Furthermore, the indictment in that case simply charged that the intent was "to commit the crime of larceny therein." This allegation was more a conclusion of the pleader than a statement of the facts. Wharton's Criminal Procedure, vol. 1 (10th Ed.), par. 466. The Draughn Case was properly decided, but we are not willing to go to the extent of holding that an indictment for burglary which properly charges the breaking and entry should also use the words "burglarious" or "burglariously" in charging the intent to commit larceny. The indictment, we think, is sufficient. It does charge that the intent to steal in this case was a felonious intent. It furthermore charges that goods, wares, merchandise, and household effects were situated in the dwelling house, and that appellant had the felonious intent to take, steal, and carry away a portion of said goods. Mr. Wharton says that "the mere allegation of an intent to commit a designated felony, without an averment of the overt acts tending towards its accomplishment, is said to be sufficient." The authorities on the point under discussion are not at all harmonious. There can be no doubt that the particular statute under review enlarges the common law, and we see no reason to require the use of the word

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"burglarious" in designating and charging the particular crime which the accused intended to commit upon the unlawful breaking and entering. To illustrate: The accused in breaking and entering might unlawfully intend to commit homicide, but in charging such a felonious intent we cannot appreciate how the word "burglarious" would at all be helpful in defining the unlawful and felonious intent to do murder. In the case at bar the felonious intent to steal is sufficiently charged.

The confessions of the accused were not rendered incompetent by reason of the failure of the deputy sheriff and jailer to caution the prisoner that his statements might be used against him. It is said in Corpus Juris. (16 C. J. 724):

"The better and safer course for an officer to pursue, when a prisoner is about to make a statement, is to warn him that it may be used against him."

But in the absence of a statute requiring caution or warning, a perfectly voluntary confession is admissible. In the case at bar the proper predicate was laid before this testimony was admitted by the learned circuit judge. It has been expressly ruled in this state that:

"No caution is necessary when the confessions are made to persons having no judicial authority." *Simon* v. *State,* 36 Miss. 636; *Dick* v. *State,* 30 Miss. 598.

It would appear under the authority of *Harper* v. *State,* 71 Miss. 202, 13 So. 882, that the language of the district attorney in his closing argument misstated the law, but the misstatement was by way of argument and on a proposition which, if embodied in an instruction at all, would require technical and delicate discrimination. The very case relied upon expressly holds that recent possession by the accused of property "burglariously" stolen is a "circumstance" which the jury may consider. But the prosecuting attorney went beyond this statement by saying that it is *prima-facie* evidence of guilt. The error complained of does not appear in

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any instruction of the court and under the facts of this particular case we conclude that the rights of appellant were not prejudiced by the argument complained of, and the error in this case should be considered a harmless error. The verdict is amply supported by the evidence.

Affirmed.

TAYLOR ET AL., COUNTY SUPERVISORS, v. STATE EX REL. COLLINS, ATTORNEY GENERAL.

[83 South. 810, In Banc. No. 21192.]

1. TAXATION. *Legislature may bestow power to equalize assessment as it may see fit.*

The power to equalize assessments given both the board of supervisors and the state tax commission are purely statutory. No constitutional privilege to equalize assessments is conferred upon the board of supervisors by the constitution; neither is any such power conferred upon the state tax commission. It therefore rests entirely with the legislature to bestow so much or so little of this power as it may see fit upon either board.

2. TAXATION. *Duties of board of supervisors when ordered by tax commission to increase value of classes of property stated.*

Under Laws 1910, chapter 98, sections 5 and 6, when a board of supervisors is notified by the state tax commission to increase the assessed valuation of any class of property, it is its duty to consider the individual assessments of taxpayers whose property is affected by the order; but if its equalization of the assessment among individuals does not produce the ordered increase, it must apply a horizontal raise to all property of the class.

3. TAXATION. *When tax commission orders increase in valuation board of supervisors has no discretion.*

Under Laws 1916, chapter 98, sections 5 and 6, the decision of the state tax commission in ordering a board of supervisors to increase the value of certain classes of property is final and the board of supervisors have no discretion about making the increase.

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4. TAXATION. *Order of state tax commission to board of supervisors to increase valuation construed.*

An order of the state tax commission to the board of supervisors to increase the valuation of certain classes of property "overvaluing no property and equalizing the assessment so that every assessment will bear an equal proportion to value," merely meant that they must not overvalue any property of the individual, when considered in connection with the value of similar property of other individuals in the county.

5. MANDAMUS. *Proper remedy to compel board of supervisors to increase valuation as ordered by tax commission.*

As the board of supervisors when ordered by the state tax commission to increase the valuation of certain classes of property has no discretion in the matter, and the state has no plain, adequate, and speedy remedy in the ordinary course of law to compel compliance with the order, mandamus is therefore the proper remedy.

APPEAL from the circuit court of Quitman county.

HON. W. A. ALCORN, JR., Judge.

Mandamus by the state on the relation of Ross A. Collins, attorney general, against C. W. Taylor, and others members of the Board of Supervisors of Quitman County. From a judgment adjudging defendants in contempt and imposing sentences, they appeal.

The facts are fully stated in the opinion of the court.

Shands & Jackson, for appellant.

Appellants contend as follows: First: That appellee was not entitled to the issuance of the writ of mandamus in this cause. Second: That in so far as the writ undertook to direct what judgment should be entered by the Board of Supervisors, that the order directing it was beyond the power of the court, and, therefore, null and void. Third: That sentence as for a contempt cannot be pronounced against any person for a violation of a void order. Fourth: The record discloses a compliance, by the appellants, with the order of the court so far as it is possible for it to be complied with, and that it is error to sentence appellants because of failure to act.

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The writ of mandamus is one of the extraordinary or high prerogative writs, and should never issue except in those cases where it is expressly provided for by the statute. Its issuance is governed by section 3231 of the Mississippi Code of 1906.

Where there is a plain, adequate and speedy remedy in the ordinary course of law, the writ of mandamus should not issue. We presume it is unnecessary to discuss the proposition as to whether or not the remedy provided by chapter 120 of the Acts of 1918 is plain. Anyone who can read, can easily understand the remedy. It is so plain that no one, even though a fool need err therein.

The next question which occurs is as to whether or not the remedy prescribed is adequate. We submit that on appeal an opportunity is given both to the taxpayer and to the state, to introduce proof to be heard, in person and by the attorney, and that when so heard, each case is decided on its own merits, and when a judgment is rendered it is final.

On this appeal provision is made for both parties calling witnesses and for the taking of proof, determined by the circuit judge to be competent, and for submitting to a jury fully charged as to the law applicable to the case, from which we submit that when accuracy and justice is the end desired, that a remedy by appeal is much more adequate than could be the hearing of the petition for a writ of mandamus, which would necessitate, if heard upon petition and answer, the taking of proof in one proceeding as to the value of every piece of property in the county.

We then come to the consideration of the question as to whether or not the remedy by appeal is as spedy. This can be determined easily by tracing the steps necessary to be taken before final judgment is reached in any case.

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If the attorney-general is dissatisfied with the value as corrected by the board of supervisors, in accordance with the instructions of the state tax commission, and he elects to appeal, the case is triable as a preference case at the next ensuing term of the circuit court, when, as indicated above, a final judgment entered, and barring the question of appeal to the supreme court fixes for once and for all the question of the taxable value of that particular piece of property.

But if on the other hand he sees fit to sue out a writ of mandamus, which is granted, and the board of supervisors, disregarding their plain duty to determine the value of each piece of property according to its true worth but blindly fixes it at an amount therefore determined by the circuit judge, no final judgment is rendered; but either the taxpayer or the attorney-general, whichever feels aggrieved by such action by the board of supervisors, proceeds then to appeal, as the attorney-general might have done in the first instance, provided the board of supervisors do not feel as the board felt in this case that they were bound by their oath of office to support the constitution of the state of Mississippi and by that provision of the constitution of the state of Mississippi which required that they should assess each particular piece of property according to its true value. *Robinson et al.* v. *Board of Supervisors of Ittawamba County,* 105 Miss. 90; *State Board of Education* v. *City of West Point,* 50 Miss. 638; 26 Cyc., page 168; *McHenry* v. *State,* 91 Miss. 562. We might multiply authorities *ad nauseam* to the same effect, but we do not consider it necessary.

Second Contention: If we be mistaken in our first contention, then we say that in so far as the judgment of the court directing the issuance of the writ of mandamus undertakes to control the discretion of the board of supervisors such writ is null and void.

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This doctrine has been announced so many times and absolutely without exception, that it seems hardly necessary to argue it other than to cite Mississippi decisions so holding, some of which are: *Madison County* v. *Alexander Walker,* 523; *Attala County* v. *Grant,* 9 S. & M. 77; *Swan* v. *Gray,* 44 Miss. 383; *Vicksburg* v. *Rainwater,* 47 Miss. 547; *Clayton* v. *McWilliams,* 49 Miss. 311; *State Board* v. *West Point,* 58 Miss. 638; *Moore County* v. *State,* 63 Miss. 135; *Shotwell* v. *Covington,* 12 So. 260; *McHenry* v. *State,* 91 Miss. 562; *Robinson* v. *Board of Supervisors of Ittawamba County,* 105 Miss. 90.

We realize, however, that in order for us to profit by this line of decisions, this court must be of opinion that the board of supervisors in determining the assessable value of real estate of Quitman County was acting in a judicial capacity.

That they so acted prior to the creation of the state tax commission was held in several of the decisions above cited by us, and which has been consistently held by the court, Section 6 of chapter 98, The Acts of 1916, expressly confers upon the board of supervisors and not upon the state tax commissioners the power of raising or lowering the individual return of a taxpayer.

Section 5, chapter 136 of the Acts of 1918, directed that the board of supervisors shall, at the June meeting, proceed to equalize such rolls. Section 6, chapter 135 of the Acts of 1918, provides for the hearing of objections at the July meeting,and provides that the board shall hear and determine all exceptions to the roll, and shall equalize the assessments, and may increase or diminish the valuation of any property so the property of the same value shall be assessed for an equal sum.

Section 7 of this act provides for final judgment to be entered by the board of supervisors which under no circumstances will preclude a taxpayer from questioning the validity of the assessment.

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Section 10 provides that the board of supervisors, after receiving instructions from the state tax commission, "shall equalize" the assessments and provides a method of appeal from this court of limited jurisdiction to the circuit court, a court of unlimited jurisdiction. Our third contention is that sentence as for contempt cannot be pronounced against any person for the violation of a void order.

It would be impossible for me, or I think for any one to make a stronger presentation of this thought than was made by WHITFIELD, Justice, in the case of *McHenry* v. *State* 91 Miss. 562; *Windsor* v. *McVeigh,* 93 U. S. 274, 23 L. Ed. 914; *Ex Parte Fisc,* 113 U. S. 713, 718; 5 Sup. Ct. 524, 28 L. Ed. 1117-1119; *Re Bonner,* 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; *Re Mills,* 135 U. S. 263-270, 10 Sup. Ct. 762, 34 L. Ed. 107-110; *Ex parte Terry,* 128 U. S. 289, 304, Sup. Ct. 77, 32 L. Ed. 405-408; *Ex Parte Reed,* 100 U. S. 13, 23, 25 L. Ed. 538, 539; *Re Frederich,* 149 U. S. 70-76, 13 Sup. Ct. 793, 37 L. Ed. 655-656; *Bigfelow* v. *Forest,* 9 Wall. 339, 19 L. Ed. 969. See, also, note entitled want of authority under jurisdiction conferred, *In re Morrill,* 11 L. R. A. 157, 20 or 96; *Ex parte Rowland,* 104 U. S. 604,, 26 L. Ed. 861, 9 Cyc 13.

In the case atbar the supreme law of the land directed that the board of supervisors in assessing the value of the property in Quitman county for taxation directs that none of it shall be assessed in excess of its fair market value, and directs that the board of supervisors shall ascertain such fair market value in a regular way, and according to the due process of law.

Obeying this supreme power in the state, the board, according to the undisputed facts in this case, as appears from their uncontroverted sworn answer, heard proof and ascertained the value of each individual acre of land in Quitman county to be as recorded upon the assessment roll.

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In this connection we wish to call the court's attention to the case of *Town of Jonestown* v. *Ganog,* 52 So. 579, in which the court says: "It appears that our statute fixes the limit of taxation for municipalities, and it seems well settled that a mandamus cannot be issued to compel the levy of a tax beyond the statutory limit."

For all of which reasons we respectfully submit that the judgment appealed from should be reversed and appellants discharged, and the motion for a citation for contempt dismissed.

Oscar Johnston, for appellant.

The power of taxation is the highest attribute of sovereignty and is a power which should be exercised with the greatest care and caution and in strict conformity with the organic law of the land. The power to sell, and, therefore, the power to take property for taxes is not protected by that provision of the constitution which stipulates that private property shall not be taken for public use without compensation being first made. *Williams* v. *Cammack,* 27 Miss. 209.

The individual, however, is protected by the constitutional provision that a person's property shall not be taken except by due process of law. In determining the power of taxing authorities and the validity of all revenue laws, a court as well as a legislature, must always bear in mind the fundamental proposition that there must be authority for the sale of the property taxed—in other words, there must be a right to enforce the collection, for no matter how great the power to tax, nor how elaborate may be the scheme of taxation if it is not accompanied by the power to sell the property, the entire structure must fall. So in constructing revenue laws it should be borne in mind that nothing may be done which will render void or abortive the effect to sell the property taxed, and in this connection it

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must also be borne in mind that no authority for the sale of the property in the enforcement of a tax collection is valid which ignores the "due process of law clause" of the Federal Constitution.

In the outset permit me to say that I do not contend that the right to assess or value property for purposes of taxation is conferred by the constitution of the state of Mississippi upon the board of supervisors. On the contrary, I concede that the entire power of the board of supervisors and its entire relation to our revenue laws is of statutory authority and that the legislature may by appropriate legislation take from the board of supervisors its entire jurisdiction of this subject-matter, whether or not the legislature has in effect exercised this prerogative I shall discuss further along in this brief.

Section 144, being the first section of article six, of our constitution, provides: "The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in this constitution." Then, after making suitable provision for the composition of the supreme court and its jurisdiction, the framers of the constitution by section 152 made provision for circuit and chancery courts providing for the division of the state into appropriate districts then defining the powers and the jurisdiction of these two courts. Then after having made the necessary provision for the supreme court and for the circuit and chancery courts, the convention in this same article by section 170 provided for the division of each county of the state into five districts and for the selection of a supervisor from each district and for the establishment of the board of supervisors. The convention proceeded, by section 171, to make provision for the justice of the peace, having thus established the judicial system ranging from the supreme court, having jurisdiction over the entire state, the circuit and chancery court.

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The wise and able lawyers composing our constitutional convention of 1890 had in mind a definite purpose in thus putting the board of supervisors in the judicial department. Normally, it would appear that the board of supervisors would more properly belong to the legislative department. It is not infrequently referred to as the "legislature of the county." Subject to certain limitations it enacts ordinances and regulations for the government of the county, it appropriates money to meet the obligations of the county, it incurs obligations in behalf of the county, it fixes the right of taxation, and in short, performs many legislative functions. Why, then, it may be asked, was it made a part of the judicial department?

The answer is clear to the student of the constitutional history of our state and the history of our fiscal system, and here we find the connection between the board of supervisors and the taxing power. By the constitution dealing with the subject of revenue the office of tax assessor was created and by law this assessor was charged with the duty of assessing, that is to say, of valuing for the purpose of taxation, all of the property of the county. Then this process of valuation was completed by the assessor, the roll upon which the valuations are shown is required to be filed with the board of supervisors for its approval.

By chapter 98, of the Laws of 1916, provision was made for the creation and establishment and the operation of the state tax commission; this law was somewhat amended in 1918 with regard to details connected with the administration of the act. Shortly after its enactment the constitutionality of the act was called into question by the board of supervisors of Washington county, that board declining to comply with an order of the commission directing it to increase the assessed valuation of personal property in Washington county. The commission, acting through the attorney-general ap-

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plied for a writ of mandamus and the case came before this court for determination; this proceeding being reported under the style of *State ex rel.* v. *Wheatley,* 113 Miss. 555 et seq. In the opinion of this court rendered in the case mentioned, was found a complete and an exhaustive interpretation of the law creating the commission, and until a further pronouncement of this court to the contrary, I take it that we are warranted in carrying out the terms and provisions of the law in question as it has been construed by and in accordance with the judgment of this court as expressed in its written opinion just cited. In the case just cited this court sustained the constitutionality of the act in question; this point having been determined, I present this cause, as stated, in the light of the interpretation placed upon the act by the court in Wheatley case. In the very beginning we are relieved of the necessity of reviewing the act creating the commission for the purpose of determining whether or not by that act any radical change was made in the existing system devised for the collection of revenue because this court at page 589 of volume 113 Mississippi Reports makes use of the following language: "There is no merit in the contention that the statute is invalid because it permits the state tax commission to equalize and raise the assessment of personal property without regard to valuation and assessment of real property; the act, itself provides no new standard of assessments." In my judgment this announcement was necessary in order to sustain the constitutionality of the act for I take it that it will not be contended that the state tax commission was established by the legislature in the exercise of its power to establish "such other inferior courts as may be necessary," under the authority of Section 172 of the Constitution of 1890. The state tax commission is in no sense a court, it has no jurisdiction to enter a judgment as between the individual property owner on the one

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part and the state of Mississippi on the other. It is merely an advisory commission created in a laudable attempt on the part of the legislature to provide for the equalization of assessments as between counties. To hold that its authority transcends that of the board of supervisors, or to hold that it may arbitrarily without evidence, without notice and without a hearing disturb the finding of a board of supervisors as to the value of a special tract of land would be tantamount to holding the act void from the beginning, because if vested with any such power the right of the citizen to "due process" is denied; likewise to hold that the commission may direct a horizontal increase or decrease in assessed valuations without regard to the value of specific terms of property would be to violate that clause guaranteeing "equality and uniformity" in the matter of assessments. So it was that this court having before it two theories or two constructions, each applicable to the act in question according to one of which the law would be unconstitutional, according to the other, constitutional, adopted, as it should have done, that theory which was consistent with the constitutionality of the act, and we are now called upon to determine the respective rights of the commission and the board of supervisors under the act as now construed.

The board of supervisors as a court prior to the enactment of chapter 98, Laws of 1916, had the right under certain prescribed conditions to revise its judgment, for example, in case of the destruction of the building it might upon proper petition lower the assessed valuation of the property upon which the building was located.

The legislature by chapter 98 broadened the jurisdiction of this court with reference to the matter of making changes in its roll, that is to say by the law in question it was expressly provided that the judgment should not become final as between the individual and the state

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until the happening of certain contingencies, namely until the roll should be sent to Jackson and there examined by a commission created by law, to-wit; the state tax commission. This commission was then by law authorized and empowered to return the roll recommending that it stand approved as made, or, if in their judgment, it did not provide for a proper assessment, recommending or directing that the board raise or lower the total values of any specific property. When the roll is thus returned it becomes the duty of the board of supervisors to give notice to the taxpayers of the re-opening of their case and of the fact that the assessments are to be revised in accordance with the direction of the commission, and therefore upon the date indicated in the notice, the board meets as a court for the purpose of reviewing its former judgment and rendering a final judgment as between the taxpayer and the state. In thus proceeding constitutional requirements are fully met and the state tax commission fully discharges the function for which it was created.

This, I understand, to be the interpretation of the law announced by this court, basing this understanding upon the following propositions quoted from the opinion of the court: "In accomplishing this increase of total valuation the board of supervisors are accorded the absolute right to distribute the burden of increase uniformly amongst the taxpayers of that class. If honest Richard Roe originally gave in his assessment at the top market price, at constitutional true value, and the state board ordered an increase whereby he is to be affected, Honest Richard has a right to appear at this meeting of the board and object to the increase so far as he is concerned. In objecting he has the right to tender evidence, if necessary, to establish his contentions. If the board should overrule his objections, he then has the right under section 8 of the Code to appeal from the order of the board to the circuit court of his

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county." Of course, the contrary must be true, that is to say, the board may sustain his contention in which event the recommendation of the commission would not be applied to the property of "honest Richard." Again quoting: "In complying with this order the local board is not denied the right to hear the complaints of individuals and to refuse to increase the assessment of any particular individual whose property is already assessed at actual value." It must follow that the board of supervisors are the final arbiters charged with the duty of determining whether or not the value of a specific term of property is properly shown on the roll, in other words to determine values as between individual items of property and the state, and it must further follow that if the board has the right to refuse to raise the assessed value of a specific item of property belonging to "honest Richard Roe" because in the opinion of the board the property of "honest Richard, is already fully assessed, then clearly it must follow that if upon examination of the roll the board finds that every specific item of property in the county has been assessed at its true value it must have the power to refuse to raise the value of any specific item of property, and having refused to raise the value of each item the board is then clearly without power to increase the total, necessarily the right to determine the value of the property belonging to "honest Richard" is the right to exercise a certain judicial discretion, and if the board in the exercise of this discretion a certain individual it has the like power to refuse to raise the value of the property belonging to more than one individual, or belonging to two, three, five or a thousand individuals, and therefore the right to refuse to raise it as to all of the individuals in the county. The matter of distributing the burden equally amongst the owners of the property of a class is one that addresses itself to the sound discretion of the board, and in the

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absence of a charge of fraud or corruption no man may say that the finding of the board upon a matter of fact, to-wit: the value of specific acre of land, is wrong. We refer the court to that part of its opinion in the Wheatley case appearing at page 594 of volume III, Mississippi Reports, where the court called attention to that part of the order of the commission which expressly stipulates that the local board shall not assess property for more than its actual value. In the very order itself, with the violation of which the board in the instant case is charged, carries with it the warning that the board of supervisors must not make a general horizontal increase and must not value any item of property at more than its true value. I pause here to ask "who is to determine the true value?" The state tax commission furnishes no evidence, but in my judgment, necessarily leaves this matter where it was originally placed by law, namely in the hands of the board of supervisors.

I again quote from the opinion of the court at page 596, volume 113, Mississippi Reports as follows: "At the same time it does not, either expressly or by implication, supercede the jurisdiction of the local board to equalize as between individuals." The original jurisdiction of the board of supervisors was to determine the assessible or taxable value of property within the county, and if the act under consideration in no wise supercedes that jurisdiction, then clearly it stands.

Coming now to apply the foregoing principles to the case at bar, we find that the board of supervisors of Quitman county met as required by law to do in the beginning and revised, corrected and reviewed the realty assessment roll of that county, then after having approved it and rendered a judgment, which may be compared to an interlocutory decree approving the roll, the roll was then sent in conformity with the law to the state tax commission; that commission went over the

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roll presumably, and returned it to the board of supervisors of Quitman county with instructions to raise the several classes of property certain amounts as indicated in their order provided that in so doing the board should preserve equality and uniformity and should not exceed the true value of any item of property, in an effort to comply with this order of the commission the board of supervisors convened, and examined, the roll, heard the objections of sundry taxpayers, considered the value of each specific item of property belonging to each of the several classes, and after full consideration determined the property of that county and of the several classes already assessed at its full value and that for that reason the directed raise could not be applied; the board then adjourned. Thereafter the commission acting in the name of the state upon the relation of the attorney-general made application to his Honor Judge WM. A. ALCORN for a writ of mandamus to require the board to carry out the orders of the commission in accordance with the law in such cases made and provided, to the petition for writ of mandamus the board of supervisors interposed a demurrer, upon the hearing of the demurrer it developed that the board of supervisors of Quitman county had not given the required notice and had not held that meeting for the purpose of carrying out the orders of the commission in the manner prescribed by law.

As stated in the outset my associates in this case have cited innumerable authorities to the effect, first, that the writ of mandamus will not lie to control the exercise of its discretion by another court; this has been too frequently adjudicated to require further citation of authority than that contained in the brief referred to. It therefore occurs to me that if the board of supervisors as a court with jurisdiction over the subject-matter and with the discretion to exercise that

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jurisdiction, it cannot be controlled by mandamus. On the other hand, if the court should overrule its former opinion and hold that the legislature has taken away from the board of supervisors its judicial character and deprived it of the jurisdiction to exercise its discretion, then, secondly, there is no legal assessment because the individual property owner is deprived of the rights guaranteed to him under the "due process of law clause" of the state and Federal constitutions and reasoning from this it would follow, in my judgment, either that the circuit court was without jurisdiction to enter the writ of mandamus in so far as it was sought by that writ to control judicial discretion of the board, or that the act itself is unconstitutional and that for either of these reasons a prosecution for contempt would not lie against persons who might decline to obey an order directing obedience either where the court was without jurisdiction or where the law was unconstitutional.

For the right of these defendants to question in this proceeding the jurisdiction of the court to enter the order directing the writ of mandamus, we refer to the authorities cited in the brief of associate counsel.

In submitting this case I direct the attention of the court again to the answer of these defendants made to the citation for contempt in support of the assertion that this board is not acting contumaciously, is not seeking to be arbitrary, and to the further fact that there is no charge of corruption or of improper motives. We are merely dealing with a situation wherein there is a clear conflict between two lawfully constituted bodies, and this court is called upon to determine the relative rights of each and to point out the respective duties of each under the law in order that each may proceed to function in accordance with the directions of the court.

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Frank Roberson, Robt. B. Mayes, Clayton D. Potter and *Wells & Jones,* for appellee.

There is but one question presented for determination in this case, and that is whether or not the order of the state tax commission in changing the assessments of different classes of property in the different counties in order to equalize the valuations can be enforced by a writ of mandamus.

Our contention in this case is that this is a foreclosed question absolutely settled and determined in the mandamus suit of *State* v. *Wheatley,* 113 Miss. 555.

It is the contention of the board of supervisors of Quitman county that after having received the orders of the state tax commission to increase the assessment of the particular classes of property that if that board meets in accordance with the orders of the state tax commission and finds in its judgment that each and every piece of property of the particular class in the county is assessed at its full value, that then it is the duty of the board of supervisors of that county to decline to enter the increase ordered by the state tax commission.

This contention of the appellants seems to be based entirely on a misconstruction on their part of the *Wheatley case, supra.* The language of the opinion upon which the impression of appellants is founded is as follows: "In complying with this order the local board is not denied the right to hear the complaints of individuals, and to refuse to increase the assessment of any particular individual whose property is already assessed at actual value."

Now it is the contention of the appellants that if they have the right to determine that any particular or individual property has been assessed at its full value that it, therefore, follows that the board of supervisors have the authority and power to determine whether each

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and every individual's property has been assessed at its true and correct value, and that in this case the appellants met as they were required to do and again went over the assessment roll of the several classes of property mentioned and examined the valuation placed upon each and every class of property belonging to each and every individual in each of the above classes enumerated and found that, in their judgment, every taxpayer was already assessed at one hundred per cent valuation on his property, and therefore, that it was impossible for them to distribute the additional percentage equitably.

This interpretation of the law would, of course, nullify the law and place the equalization of assessments again exclusively in the various boards of supervisors, and this situation is readily conceded by the able counsel for appellants. The phrase above quoted, isolated and disconnected with the entire opinion, would furnish some plausibility for the position assumed by the appellants, but the meaning of the court is made clear in the very next sentence. The court follows the phrase above quoted by the following language: "This does necessarily mean that the local board should not increase the grand total of the class. It is their duty to increase the grand total of the class in accordance with the instructions of the state board, but in making the increase to distribute the burden equitably amongst the members of that class, this construction of the statute frees it from the charge that it violates the due process clause of both the state and federal constitution, and renders the act in this regard constitutional."

"It is our contention, therefore, that in making assessments that the total value of any class of property when once fixed by the state tax commission for any county is conclusive in so far as the total valuation of such property is concerned for such assessments. In

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other words, for assessment purposes there is a conclusive presumption of law that the finding of the valuation of any class of property in a county by the state tax commission is correct. The apportionment, however, of the increase, or of a decrease, as ordered of the individual taxpayer is confided to the various boards of supervisors. Appellants have no standing in court for this reason; they have failed to meet the statuory requirements.

Presumptively the assessments of the state tax commission were correct. See the very recent case of *Robertson, State Revenue Agent,* v. *W. S. Nursery,* 83 So., 307. The whole question in this case after all, is in whom has the legislature placed the finality of decision. In other words, did the legislature make it optional with the boards of supervisors to enter the orders of the state tax commission as the boards of supervisors in their judgment thought proper or did the law require the board of supervisors to enter orders of the state tax commission increasing or decreasing the assessments as the case may be.

There can be no question as to where finality rests for section 6, chapter 98 Laws of 1916, provides that if the president of the board of supervisors of any county appeared with the five witnesses, etc., and had been heard by the state tax commission that: "The decision of the board of state tax commissioners then made shall be final and upon the rendering of their decision it shall be the duty of the board of supervisors to immediately revise and correct the county valuation, in the manner hereinbefore in his section contemplated and provided. The revised and corrected property valuations thus made shall be the fixed and legal valuation of the property for the payment of the taxes and it shall be the duty of the taxpayer to pay his taxes thereon accordingly."

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Now this statute has been declared constitutional, valid and enforceable by the supreme court of Mississippi in the *Wheatley case, supra.*

It is our contention that the matter of fixing the aggregate value of each class of property for each county in the state is a matter confided to the judgment of the state tax commission by this statute. On the other hand, how this burden shall be apportioned amongst the various taxpayers in the different counties in the state is a matter of which the board of supervisors of the various counties have absolute control, and which is a matter confided to their judgment alone.

The injunction throughout the tax commission law that property shall not be assessed at more than its true value, and making the true value of the property the criterion for assessment is but repeating the constitutional provision that property shall be assessed at its true value, and these provisions are binding on every equalization board and upon the juries and the courts and everyone else who have to do with fixing assessments. However, the authority to determine what the true value is must necessarily be placed somewhere and the determination of the aggregate value of each class of property in the different counties has been placed by the statute in the state tax commission, but the right to equalize between individuals yet remains in the various boards of supervisors of the different counties of this state.

We respectfully submit that this case ought to be affirmed on both appeals for the only question presented is foreclosed by the decision of this court in the Wheatley case, and for the further reason that the board of supervisors have not even done those things that the statute pointed out as necessary to do when dissatisfied with the assessments, for they failed to come before the state tax commission with the witnesses as they were required to do and to give the tax commission

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an opportunity to correct any error made by them. Surely the appellants in this case will not be permitted to appeal to the courts when they failed to give the state tax commission an opportunity to correct their error, if the tax commission was in error.

Because the terms of office of the members of the board of supervisors have expired, that portion of the sentence that requires them to stand committed until the mandamus is obeyed, will probably have to be eliminated from the judgment of the court, but the fine of dollars and costs should stand.

We respectfully submit that the case ought to be affirmed both as the original judgment of the lower court and the contempt proceedings.

SYKES, J., delivered the opinion of the court.

This suit was begun by petition of the state of Mississippi upon the relation of Ross A. Collins, attorney-general, praying the issuance of the writ of mandamus against appellants as members of the board of supervisors of Quitman county, to compel them to make an increase in the valuation of certain classes of real property upon the assessment roll in that county as follows: Cultivatable lands, ten per cent.; buildings and improvements thereon, ten per cent.; timbered lands, including timber, forty per cent.; uncultivatable lands, thirty-five per cent.; real estate in cities, towns, and villages, eighty per cent.; buildings and improvements therein, seventy per cent.; in accordance with an order of the state tax commission dated September 9, 1919, reading as follows:

"It appearing to the satisfaction of the state tax commission of the state of Mississippi, after visiting the several counties of the state, conferring with the assessors thereof, and studying the values of the various classes of property therein, the economic conditions thereof, and the methods employed by the assessors and supervisors in making and equalizing the assessments

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thereof, and after making a careful examination of the recapitulations of the assessment rolls of real and personal properties of the several counties and a comparison of the assessments therein contained, that it is necessary that the foregoing percentages be added to or taken from the assessments of the various classes of real and personal properties on said assessment rolls of Quitman county, for the tax year of 1919, as shown by the foregoing statement (appearing on the reverse side hereof), in order that the assessments in said county be equal and uniform with those in the other counties in the state: It is therefore hereby ordered, in compliance with the requirements of chapter 98 of the Laws of 1916, as amended by chapter 135 of the Laws of 1918, that the foregoing percentages (appearing in the foregoing statement on the reverse side hereof) be and they are hereby added to or taken from the said assessments of the real and personal property of said county, respectively, as shown by said foregoing statement, and that the chairman of said commission mail a copy of these instructions to the board of supervisors of said county to proceed in accordance with the requirements of said chapter and amendment thereto, to make the changes in accordance with this order in the assessments rolls of real and personal properties of said county for the year 1919, overvaluing no property and equalizing the assessments so that every assessment will bear an equal proportion to value."

The petition alleges that the total increase in the value of real property in Quitman county ordered by the state tax commission amounts to one million, ninety-six thousand, three hundred and four dollars; that the assessed value of the real property of this county, with the percentage of increase ordered by the state tax commission, would then only about equal in amount the assessed valuation of the real property as made by the tax assessor of that county; that the assessed

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valuation of real property in Quitman county as approved by the board is much less and much below the true value of such property, and that the assessed valuation of this property as approved by the board is much less than the assessed valuation of like property in other and adjoining counties of the state; that the increase in valuation, ordered by the tax commission on these classes will in none of them cause the same to be assessed at a value in excess of its true value, or in excess of the assessed valuation of like property in other and adjoining counties. The petition alleges the giving of the notice to the board of supervisors as required by law; that there was no protest by the board of supervisors against the increased valuation of these classes of property, or any dissatisfaction expressed by it as to the corrections and changes ordered by the state board, and no witnesses were appointed to appear to protest before the state board, in accordance with section 6, c. 98, Laws of 1916, creating and defining the duties of the state board.

The petition alleged a total failure upon the part of the board of supervisors to comply with its order. It further alleges that it is the plain ministerial duty of the board of supervisors to make the changes ordered and directed by the state tax commission; that the said board on October 7, 1919, passed an order declining and refusing to comply with the order of the tax commission and to make the changes.

A demurrer was filed to the petition and overruled by the court. It is unnecessary to state the grounds of the demurrer, as those material will be disclosed further on.

Upon the overruling of the demurrer the court issued the writ of mandamus directing the members of the board to comply with the order of the state tax commission and make the increases in the assessed valuation of the classes of property named. The president

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of the board was further ordered to call a meeting of the board as required by section 6, chapter 98, Laws of 1916, and at said meeting the board was ordered by the court to conform to the instructions of the state tax commission above set out, and to take all necessary steps to comply with the writ of mandamus and the instructions of the tax commission not later than the 19th day of November, 1919.

The state at a later date filed a petition in this case citing briefly its history and stating, in substance, that the members of the board of supervisors of Quitman county had failed to obey the writ of mandamus, but had passed an order declining and refusing to comply with the directions of the court contained in said writ. In this petition it was asked that the members of the board of supervisors be adjudged in contempt of court and punished accordingly. A copy of the order of the board of supervisors was attached to this petition. This order of the board shows that they held a meeting as ordered by the circuit court, after due notice of same had been published. This order shows that the board took up for consideration the several classes of real property ordered increased by the state board; it shows that the board considered each and every individual assessment of property ordered increased and found that the objections presented by the several property owners were well founded, and sustained these objections and approved the assessments as previously made.

It further recites that the board had carefully examined the assessment of property of each of the foregoing classes, and having determined the assessable value of each specific item of property of each of said classes doth now order and adjudge the specific value of each item of property of each of the foregoing classes to be shown upon the assessment roll aforesaid; that—

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"The board of supervisors of Quitman county having approved the several assessments of the sundry items of real property of Quitman county, Miss., and in the exercise of their judgment and discretion having declined to increase the assessed valuation of the property belonging to the several individual property owners, finds itself unable to increase the grand total of aggregate value of the property of each of the said classes of property, and for that reason unable to comply with the order of the state tax commission directing a total of aggregate raise in the total valuation of the properties of the said several classes and unable to raise the aggregate valuations in compliance with the order of said tax commission."

To this contempt proceeding the members of the board of supervisors filed an answer setting up, in substance, that they attempted to comply with the writ of mandamus by the meeting whose proceedings we have briefly above stated; that at said meeting they examined the several assessments of individual items of property as shown on the assessment roll, and attempted to determine the true, correct, and fair assessable value of each item of taxable real property, and to assess each item accordingly and in accordance with the law, the order of the state tax commission, and the mandate of the circuit judge; that having done so the board found it impossible to increase the aggregate value of the several classes of real property to the extent directed unless the board should enter an order directing a horizontal increase in value; that such a horizontal raise would be violative of both the Constitution and statutory law, and contrary to the order and instructions of the state tax commission and of the circuit court, and to make such an increase would result in the assessment of certain specific items of property greatly in excess of the true value of the property.

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Defendants denied that they had disobeyed or disregarded the mandate of the court; that one of the duties and powers conferred upon them is to fix and determine and to adjudicate, as between the individual property owner and the state, the correct value of property for purposes of taxation, and to enter their judgment or finding upon the realty assessment roll of said county, and to make oath to the correctness of their judgment; that to the best of their knowledge, belief, and ability they have exercised their discretion in the discharge of this duty. Defendants then asked that the writ of mandamus be made more specific and certain, and that they desire to be informed whether or not they are to increase all property horizontally and are to be denied the right to pass upon the valuation of specific items of property; that if it is not to be a horizontal raise the court or the tax commission is to point out the specific property upon which the increase is to be applied. The answer is quite voluminous, but we have above set out the material parts of it.

The contempt proceedings were heard on the petition and exhibits and the answer of the defendants and exhibits, and the defendants were adjudged to be in contempt of court for failing to fully comply with the writ of mandamus, and were sentenced to be confined in the county jail of Quitman county until they had complied fully with the writ of mandamus and the order of the state tax commission, and, in addition thereto, each member was sentenced to pay a fine of $10 for disobedience to the said writ.

By this appeal we are again called upon to construe the certain portions of chapter 98 of the Laws of 1916 creating a state tax commission and defining its powers and duties. There is but one real question involved in this appeal, and that is whether or not by this act the state tax commission is given the absolute authority to order the board of supervisors to raise or

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lower the assessments on certain classes of property which in the judgment of the state tax commission are either over- or underassessed when compared with the property of the same classes in other counties. In other words, as between the state tax commission and the board of supervisors, which one of them has the superior or final judgment to say whether or not property or classes of property in a county are properly assessed, overassessed, or underassessed. It is the duty of the board of state tax commissioners to equalize the taxes among the different counties of the state. The board of supervisors is the equalizer of the assessments of the individuals. The state tax commission is the equalizer of the assessments among the different counties.

The powers to equalize assessments given both the board of supervisors and the state board are purely statutory. No constitutional privilege to equalize assessments is conferred upon the board of supervisors by the Constitution; neither is any such power conferred upon the state tax commission. It therefore rests entirely with the legislature to bestow so much or so little of this power as it may see fit upon either board.

By section 112 of the Constitution property cannot be assessed for more than its true value. This inhibition is binding upon both the state board and the board of supervisors. Prior to the passage of the state tax commission law the boards of supervisors were given power to equalize all taxes within their county. This discretion was vested in them, and a dissatisfied taxpayer was given the right to appeal in case he thought his assessment improper.

Chapter 98 of the laws of 1916 (section 5) confers upon the board of state tax commissioners the power to examine the assessment roll of the several counties, to compare them for the purpose of ascertaining the

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tax valuation of the various classes of property as made in the respective counties of the state, and to ascertain if the same be reasonably uniform, and if it shall appear to this board that in any of the counties the taxable value fixed upon any one or more classes of property are not uniform with the same classes of property in other counties, the board of state tax commissioners must investigate the facts and are authorized to adjust and equalize the same, either by adding a fixed per centum to the assessed valuation of any class of property which is too low, provided such raise shall not exceed the actual value of the property in any case, or correspondingly they may order a reduction. They must then notify the president of the board of supervisors of the county affected that the county valuation upon these classes of property shall be raised or lowered. Under this section the state tax commission board is given the authority to pass upon the valuations of the classes of property as shown by the assessment rolls of the different counties, and to order an equalization of these assessments either by ordering an increase or a decrease in the assessment of certain classes of property in certain counties.

Section 6 of this act provides for the calling by the president of the board of supervisors of a meeting of the board in the county ordered to change its assessment. This section then provides that—

"At the said meeting the said board shall correct the county valuation upon the class or classes of property specified by the board of state tax commissioners, so as to make the same conform to the findings of the said board of state tax commissioners by applying uniformly to the specified class or classes of property the fixed increase or of decrease specified by the said board of state tax commissioners, and by raising or lowering all the individuals' returns of all the taxpayers of the

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county upon the specified class or classes of property accordingly."

When a meeting of a board of supervisors is held in pursuance of this part of section 6 it is the duty of the board to consider the individual assessments of the taxpayers whose property is affected by the order of the state board of equalizers. Each individual taxpayer of this class has a right to be heard before the board, and it is the duty of the board to equalize among these individual taxpayers the assessment of their taxes on the classes of property affected. If by this equalization, however, the aggregate amount ordered to be increased on this class of property by the board of state tax commissioners is not thereby raised, then the board of supervisors must distribute equitably among this class of taxpayers an increase in their assessments which will produce the amount of money called for by the order of the state tax commission. Assuming that the board has equalized the assessment among the individuals of the classes of property to be affected by this increase, and that in this equalization the aggregate amount called for by the order of the state board has not been raised, then there is nothing left for the board of supervisors to do except to apply a horizontal raise to the property of this class. By this law the decision of the board of state tax commissioners as to the value of the classes of property of the various counties is binding upon the boards of supervisors. By section 6 of this act it is further provided that where there is a contest before the board of state tax commissioners by the board of supervisors:

"The decision of the board of state tax commissioners then made shall be final and upon the rendering of their decision it shall be the duty of the board of supervisors to immediately revise and correct the county valuation, in the manner herinbefore in this section contemplated and provided. The revised and corrected

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property valuations thus made shall be the fixed and legal valuation of the property for the payment of taxes, and it shall be the duty of the taxpayer to pay his taxes thereon accordingly."

In other words, as between the board of state tax commissioners and the board of supervisors, the decision of the board of state tax commissioners ordering an increase in the value of certain classes of property is final. There is no discretion vested in the board of supervisors about making this increase. It is its duty to do so. As between these two boards, the state tax commissioners has the power to find and say what the true valuation of the classes of property named in its orders are, and this judgment is final so far as the board of supervisors is concerned. It must accept this finding of the state tax commission whether it thinks it too much or too little. So far as any discretion in this matter is concerned, by this act creating the tax commission this discretion is expressly taken away from the board of supervisors and vested in the state tax commission. when the board of supervisors meets to comply with the orders of the state tax commission it has no discretion whatever in raising the requisite amount of revenue on the class of property therein named in the order of the state tax commission. Its only discretion is to again go into the question of equalizing the relative value of this class of property among the individual taxayers. When this equalization has been made and the amount called for by the order of the state tax commission has not been raised, then the balance of this amount must be raised by the board of supervisors by applying equitably what would then necessarily be a horizontal raise to this class of property.

In other words, by chapter 98 of the Acts of 1916 the state tax board is given the final decision, as between these two boards ,as to the assessable valuation of the

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classes of property mentioned in its order. When equalization among individuals has been made, the board of supervisors then merely has a ministerial duty to perform, to raise horizontally the balance due as called for by the order of the state tax board. The aggrieved taxpayer, if by this order of the state tax board his property is overassessed, is given a right of appeal by chapter 120 of the Laws of 1918, amending section 81 of the Code of 1906.

In the case of *State* v. *Wheatley*, 113 Miss. 555, on page 592, 74 So. 427, on page 430, in construing section 6 of this act, the court, through Judge Stevens, said:

"By the terms of this section the board of supervisors are not directed to increase every individual taxpayer and fix an arbitrary percentage, but distributes the burden of increase amongst the individual taxpayers within the class of property affected by the order. . . . In accomplishing this increase of total valuation, the board of supervisors are accorded the absolute right to distribute the burden of increase uniformly amongst the taxpayers of that class."

Again, on page 593 of 113 Miss., on page 31 of 74 So.:

"As to the class of property upon which the increase is ordered, there is no final adjudication until the local board has complied with the order of the state board. In complying with this order, the local board is not denied the right to hear the complaints of individuals, and to refuse to increase the assessment of any particular individual whose property is already assessed at actual value. This does not necessarily mean that the local board should not increase the grand total of the class. It is their duty to increase the grand total of the class in accordance with the instructions of the state board, but in making the increase to distribute the burden equitably amongst the members of that class."

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Again, at the bottom of page 595 of 113 Miss., on page 432 of 74 So., in construing the latter part of section 6 of this act, it is said:

"Certain it is that if the state board refuses to rescind the order the local board must return to their county and make the corrections; and in doing so it is their duty to equalize the additional increase of burden amongst the taxpayers affected by the order. . . . The statute under review in no wise undertakes to equalize as between individuals, but exclusively between counties. At the same time it does not either expressly or by implication supersede the jurisdiction of the local board to equalize as between individuals, and nowhere does it take away the right of the individual to an appeal."

It is contended by the appellants that by the order of the state board of equalization the board of supervisors were enjoined in the last clause of this order to overvalue no property and equalize the assessment so that every assessment will bear an equal proportion to value. This part of the order merely means that they must not overvalue any property of the individual when considered in connection with the value of the same property of other individuals in the county. In other words, that they must be careful to equalize the value of the individuals in the county, and if the property of one be overvalued when considered in connection with the property of another, this overvaluation or inequality should be corrected. Section 112 of the Constitution carries this same inhibition, as also does section 5 of the Act of 1916, chapter 98, which reads as follows:

"Provided, such raise shall not exceed the actual value of the property in any case."

This adds nothing to and takes nothing from the order of the commission, but is merely a part of the constitutional and statutory law of the state which prohibits the overvaluing of property for taxation.

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Chapter 98 of the Laws of 1916 was amended by chapters 135 and 228 of th Laws of 1918. These amendments are not before us in this case. Under section 6, chapter 98, Laws of 1916, it is mandatory upon the board of supervisors to make the increase in the aggregate value of the classes of property affected in accordance with the order of the board of state tax commissioners. They have no discretion whatever in the matter. It is their duty to comply with this order.

The state had no plain, adequate, and speedy remedy in the ordinary course of law by which it could compel this board to comply with this order; consequently mandamus was the proper remedy to pursue. The same remedy was pursued in the *Wheatley Case, supra. Moreau* v. *Grandich,* 114 Miss. 560, 75 So. 434; *Herbon* v. *Lawrence Co.,* 109 Miss. 397, 69 So. 209, L. R. A. 1916B, 622. Ann. Cas. 1917E, 410; *Ross* v. *Wimberly,* 60 Miss. 345; *Klein* v. *Smith Co.,* 54 Miss. 254.

The judgment of the lower court finding the defendants to be in contempt of court is affirmed. Their terms of office however having expired, that part of the order remanding them to jail is stricken out. Affirmed, with this modification.

Affirmed conditionally.

YAZOO & M. V. R. Co. v. McNEELY.

[83 South. 815, In Banc. No. 21101.]

APPEAL AND ERROR. *Questions arising on trial of plea in abatement are reviewable on appeal from final judgment.*

Questions arising on the trial of the issue raised by plea in abatement are reviewable on appeal from final judgment on the merits, since an appeal from a final judgment for plaintiff brings up either the entire record in the case or so much thereof as is necessary for the decision of all questions relating thereto that are open for review by the appellate court.

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Appeal from the circuit court of Wilkinson county. HON. R. E. JACKSON, Judge.

Suit by Clarence McNeely against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. F. Tucker, Chas. N. Burch and *H. D. Minor,* for appellant.

D. C. Bramlett, Jr., for appellee.

SMITH, C. J., delivered the opinion of the court.

The appellee instituted this action to recover from the appellant damages alleged to have been sustained by him because of the appellant's negligence. A plea is abatement was interposed by the appellant, and a trial on the issue thereby raised resulted in a judgment for the appellee. The cause proceeded to a trial on the merits, resulting in a judgment exonerating the appellant, from which an appeal to this court was taken and the judgment of the court below was reversed and the cause remanded (*McNeely* v. *Y. & M. V. R. R. Co.,* 119 Miss. 897, 81 So. 641); the ground of the reversal being that the judgment rendered in favor of a plaintiff on a plea in abatement should be *quod recuperet.* The cause was then remanded solely for the purpose of fixing the amount of the then appellant's damages.

The present appellant then appealed from the judgment on the issue raised by the plea in abatement, which appeal was dismissed by this court without an opinion (82 So. 338). The present appeal is from a judgment fixing the amount of the appellee's damages, and the appeal bond recites that the appeal is prayed both from the judgment on the issue raised by the plea in abatement as well as from the final judgment fixing the amount of the appellee's damages.

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The cause now comes on to be heard on a motion filed by the appellee to dismiss the appeal; two of the grounds thereof being:

"(1) The judgment rendered by the circuit court on the issue created by the plea in abatement and the replication thereto and the verdict of the jury was not against appellant, and appellant was not aggrieved thereby.

"(2) This cause was determined and judgment *quod recuperet* in favor of Clarence McNeely, appellee herein, was rendered by this honorable court on June 2, 1919, and a suggestion of error filed by the Yazoo & Mississippi Valley Railroad Company, appellant herein, to said opinion of this honorable court, was overruled on June 30, 1919, which decision and judgment is *res adjudicata* of this appeal."

If the appellant is now entitled to have any of the questions growing out of the trial of the issue raised by the plea in abatement reviewed by this court, as to which we are not now called on to express an opinion, all such questions will be presented for consideration by the appeal from the final judgment; for an appeal from such a judgment brings up either the entire record in the cause or so much thereof as is necessary for the decision of all questions relating thereto that are open for review by this court. The recital in the appeal bond that it covers an appeal from the judgment on the plea in abatement was therefore unnecessary.

Overruled.

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MULLICAN ET AL. v. MERIDIAN LIGHT & RY. CO.

[83 South. 816, In Banc. No. 20917.]

1. PLEADING. *Declaration to be construed against pleader.*
A declaration is to be construed most strongly against the pleader, and the character of a contract set out as a part of it cannot be altered by any allegations or conclusions.

2. NEGLIGENCE. *Light company held not liable for death of customer's employee caused by failure of lights.*
Where a company contracted merely to furnish electrical energy for power to the operator of a linter washing and drying factory, it was not liable for the death of an employee in such factory, who, when the lights went out on account of a failure of power, fell into a vat of boiling chemicals, there being no duty on the power company toward the employee either as the agent of his employer or otherwise.

3. PLEADING. *Plea in bar setting up discharge in bankruptcy and concluding to county a joinder of issue if valid at all.*
In an action for the death of a servant against his employer and a light and power company whose negligence caused the death where defendant employer, set up his discharge in bankruptcy by plea in both concluding to the country, such plea was insufficient in law and form, and could have been stricken out or answered either by demurrer or replication and under the circumstance should have been considered as a joinder of issue, if valid at all for any purpose, and motion for final judgment on it should not have been sustained.

APPEAL from the circuit court of Lauderdale county. HON. R. W. HEIDELBERG, Judge.

Suit by J. W. Mullican and others against the Meridian Light & Railway Company and V. L. Crawford. From a judgment for defendant, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

R. H. Thompson, of counsel for appellants.

The only feature of the brief in behalf of the Meridian Light & Railway Company to which we deem

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proper to make extended reply is the one relating to the proximate cause of the injury and death of Mullican.

The use of old, worn, inadequate and defective machinery by the Light & Railway Company to light Crawford's factory was the cause of the lights going out and the old, worn, inadequate and defective machinery was negligently used by that company with full knowledge of all the circumstances of the case and the company was charged with knowedge of the danger in which Mullican would be placed if the lights in the factory were permitted to be extinguished. The company cannot escape liability which naturally resulted from its negligence by claiming, as is done for it, that Mullican should have remained motionless in the factory until the lights were renewed, or until daylight the next morning. The proximate cause is by no means always the last intervening cause. Where the negligence of one person naturally causes or can reasonably be apprehended to cause action by another who is injured, the negligent act of the first party does not cease to be the proimate cause of the injury because the party injured did that which he reasonably would be expected to do as a consequence of the negligent act which caused him to do what he did.

If a man shoots at another, missing him, but so frightens him as to cause him to jump in such a way as to injure himself, the shooting is the proximate cause of the injury, although had the injured party stood still he would not have been injured.

The proximate cause is that which is nearest in the order of responsible causation; that which stands next in causation to the effect, not necessarily in time or space but in casual relation. Bouvier's Law Dictionary (Rawle's 3'd Revision), p. 2762.

The going out of the lights, the darkness, caused Mullican to walk and caused him as well to fall into the vat and lose his life. It was the proximate cause of

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both his walking and falling into the vat and the proximate cause of his death. The same cause as in this case, may proximately result in more than one thing; the going out of the lights proximately caused Mullican to walk, to fall into the vat and to lose his life. It would be absurd for the light company to claim that proximate cause of Mullican's death was the fact that the vat contained boiling liquids, and that the claim made that decedent proximately caused his own death by walking in the room after the lights were extinguished unsupported by no better reason than would be the claims, if made, that the vat's containing boiling liquid was the proximate cause of his death.

In the case recently decided by this court, *Alabama & Vicksburg Ry. Co. et al.* v. *Beard* (No. 20552, 81 So. 14), this court did not consider the question of proximate cause worthy of mention, although that case presented the question as a defense much more reasonably than does this one. In that case (decided March 17, 1919, by division B of this court) two independent acts intervened after what was held to be the negligent act of the defendants, before plaintiff was injured, one of the acts of the plaintiff in going into the narrow space between the railroad car and the bulk head of the board, and the other, the act of the unknown stranger in getting upon the side of the car, so that their bodies were brought into contact by the movement of the train. Had neither of these intervening acts been performed, Beard would not have been injured, and neither of these acts was the act of the defendants.

Unless the Beard case was wrongfully decided, we submit, there is not even a shadow of merit in the proximate cause defense in the case now at bar. See *Yazoo City* v. *Purchel,* 89 Miss. 700; *Illinois Cent. R. Co.* v. *Seamans,* 79 Miss. 106; *Gulf, etc., R. Co.* v. *Sneed,* 84 Miss. 252, and *Yazoo, etc., R. Co.* v. *Aden,* 77 Miss. 382, cases holding that such intervening causes

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as are claimed in this case prevent the preceding negligence of the defendant from being the proximate cause of injuries.

We will mention only one other point made in the brief to which we are now replying. The contract between Crawford and the light company was one of employment by Crawford of the light company to perform for him the duty owed by him to his employees. If Crawford made the light company his agent to light the factory, that company is liable to whomsoever was damaged by its misfeasance in performing its duty; and the use of old, worn, inadequate and defective machinery in performing its agency was a misfeasance and not a mere non-feasance. This certainly is true where, as in this case, the agent selected and used his own tools and machinery. Crawford could not, nor could the light company, escape liability to the injured third persons by stipulations embodied in their contract of agency. Establish the doctrine that both the principal and the agent, or either of them, can free themselves from liability for negligence resulting in injury to third persons, and it will soon follow that the injured in such cases will be without redress.

Amos & Dunn, for appellee.

On September 9, 1916, the appellee Crawford filed his plea of not guilty to the declaration. It appears, however, that on the 25th, day of August, 1916, Crawford had been adjudged a bankrupt, and that the trustee of his estate on September 26, 1916, filed a motion for a stay of further proceedings in the cause, as against said defendant, which motion was by the court sustained, and an order entered in the case accordingly by the circuit court.

Crawford was discharged in bankruptcy by an order for the district court of the United States for the East-

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ern Division of the Southern District of Mississippi, on the 18th day of January, 1917; and on March 26th, 1917, he filed a plea setting up his discharge in bankruptcy in bar of the appellant's claim and demands.

No further proceedings appear to have been taken in the cause until December, 1918, some eighteen months after said plea in bar was filed; when the circuit court entered an order in which it is recited that the defendant Crawford had submitted a motion for a judgment final in his favor for the plaintiff's failure to reply to his said special plea. The court sustained the motion, and entered a judgment final in favor of the appellee, Crawford.

It is nowhere insisted, that it was error in the court below in sustaining the motion of the appellee Crawford for a judgment final, on account of the failure of the plaintiff to reply to said special plea. First, because said plea concluded to the country, and not with a verification; second, said special plea was without merit; and third, because the court had entered an order staying further proceedings in the cause, and ought not, therefore, to have heard or considered the motion until the stay order had been revoked.

We appear here only for the appellee Crawford, and will notice but briefly the contentions which are made by the appellants which affect Crawford's interest.

The body of the plea, the entire substance thereof, is of such nature and character as to essentially classify it as being one in bar, and not a plea to the merits. We submit that the plea should not be stripped of its value and effectiveness simply because the pleader inadvertently closed it with a conclusion to the country instead of by a formal verification. The plea was treated in the court below by all parties as a plea in bar, and no question was there raised as to its technical accuracy, and this objection is raised to the plea for the first time in this court. It must be conceded

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of course, that the proper conclusion to such plea is with a verification, and not to the country. But we submit that in a case like this, where the technical imperfection of the plea was not called to the attention of the trial court, that it ought not to be made the basis of a reversal of the judgment of the trial court by this court. No doubt if the court's attention had been called to the technical inaccuracy of the plea, the defect would have been promptly corrected. The record does not show any exception to the court's action in sustaining the motion of the defendant for a judgment on the plea for want of a reply thereto. Certainly a party will not be permitted to stand by and see the court inadvertently misled into technical error, say nothing, and do nothing that will call the court's attention to the irregularity and be permitted thereafter to profit by such practice. In *Queen City Manufacturing Company* v. *Blaloc,* 18 So. 800, this court said: "But the defendant should object in the trial court to such proceeding in order that the court's attention being directed to the matter, the correction may be there applied." In the case of *Hayes* v. *Slidell Liquor Company,* 55 So. 456, the court again says: "The general rule is that alleged errors of the trial court occurring during the trial will not be reviewed on appeal, unless such errors have been called to the attention of the court in a motion for a new trial, in which they are assigned as grounds of the motion, and an opportunity then given to correct them, followed by a judgment overruling such motion."

In volume 6, page 283, of the Encyclopedia of P. and P. on the subject of Waiver in the matter of pleadings the rule is stated to be: "Where a party demurs, or pleads to the merits, or goes to trial, or notices the cause for trial, without objecting to his adversary's pleadings, he waives all objections thereto on the ground of indefiniteness and uncertainty." On the sub-

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ject of objections to pleas, see note six under the text above quoted.

The technical exception to the plea might be the subject of more serious consideration here, if there should be any merit in the proposition of the appellants that the plea in substance was frivolous, but such is not the case.

The general rule undoubtedly is, that the bankrupt is discharged from liability for all torts, except those proceeding from the personal, wilful, or malicious act of the bankrupt himself. The Amendment of 1903 of the Act of Bankruptcy expressly provides that the bankrupt shall be discharged from all liabilities, except those of a certain character. The liability charged in the declaration in this case, is not within the excepted class, and is one from which the bankrupt may be discharged.

There is room no doubt whether under the amendment of 1903 unliquidated damages for a tort is a provable claim against the estate of the bankrupt; and the general rule seems to be that although the bankrupt is discharged from liability for all demands founded upon tort, except these of a certain enumerated class, the practice is for the bankrupt to await the reduction of such demand to judgment and then, by petition, ask for a discharge from the judgment. The right to be discharged from the liability is clearly fixed by the law. The question therefore is whether the rule of practice which seems to have been adopted by the courts is exclusive, or whether, since to be discharged from liability is a right, that parties in interest, as in this case, may not waive the rule of practice, and the discharge made available to the bankrupt by other means or methods than the rule generally adopted by the courts.

Keeping in view the fact that to be relieved of the liability is a right clearly established by law, can it be said that to plead such right in bar of the liability is

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frivolous, or that when pleaded, the plea is a nullity and may be ignored? We think not; such plea could not withstand a demurrer or perhaps might be stricken on a motion. But so long as its sufficiency remains unchallenged and the parties choose to treat it as properly presenting a valid defense to the action, and where as in the instant case, the court having full jurisdiction of the subject-matter of the suit, proceeds to a final judgment therein, without objection then made, or exception taken, to the court's action, the parties ought not thereafter to be heard to complain that a simple rule of practice has been violated by the court. See authorities above referred to on the question of waiver in proceedings.

In the case of *Gully* v. *Dunlap et al.*, 24 Miss. at page 413, the court says: "It is insisted that this action cannot be maintained for the use of the parties suing, because one of them was a minor when the suit was instituted. On this point the rule is well settled, that if an infant sue, his infancy must be pleaded in abatement. It cannot be insisted upon after the defendant pleads in chief. 1 Chitty, on Pl. 436; 7 Johns. 373; 1 Cow. 33. Even if the infancy of the plaintiff had been pleaded in abatement, it has been ruled in some cases, that the court might amend by inserting a *prochein ami*. 8 Pick. R. 553." Also, see, *Schmerham* v. *Jenkins*, 7 Johns. (N. Y.) 373; *Bond* v. *Harrington*, 1 Pick. (Mass.) 552; *Draygo* v. *Moso* 1 Speers (S. Cor.) 212; *Young* v. *Young*, 3 N. H. 345.

If there was error in any of the acts of the court below, there does not appear to have been any exception taken, or objections made thereto at the time, and every assignment of error here made, which affects the interest of the appellee, Crawford, are based upon alleged errors of procedure merely in the court below and made in this court for the first time, and therefore comes too late.

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HOLDEN, J., delivered the opinion of the court.

This suit was instituted by the appellants, Mrs. Mullican and her children, against the appellees, V. L. Crawford and the Meridian Light & Railway Company, for damages for the death of John W. Mullican, husband of the appellant and father of the children, caused by the negligence of the defendants. A demurrer to the declaration interposed by the Meridian Light & Railway Company was sustained by the court as to it, and a plea of discharge in bankruptcy by the appellee, Crawford, resulted in a judgment discharging him, from which judgments this appeal is prosecuted.

In order to have a clear view of the case presented and of the legal question involved, we consider it necessary to set out the declaration in full so that we may determine whether or not it states a cause of action under the law. It may be here stated, in substance, that the appellee Crawford operated a manufacturing plant at Meridian for the manufacture of cotton linters into absorbent cotton for the purpose of making gun cotton and other high explosives. There were located in this plant several vats or boilers containing a boiling solution of chemicals. The deceased, Mulican, was employed to work in and around these vats, and was so employed when he fell into one of them, which caused his death. The declaration reads as follows:

"Plaintiffs charge that the said V. L. Crawford on the —— day of ——, 1915, established a manufacturing plant in the city of Meridian, Lauderdale county, Miss., for the manufacture of cotton linters into absorbent cotton, cotton batting, etc., and the process of manufacturing in said plant was to take the cotton linters and cotton fiber and remove therefrom all fatty oils and acids, and to bleach it and put it through certain chemical processes and prepare it for making gun cotton and other high explosives. In order to pre-

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pare this cotton for gun cotton and other high explosives, the manufacturing plant of V. L. Crawford, aforesaid, was located in a large building in Meridian on the north side of which is located a large lot of machinery which is operated and driven by electric power for carding and manipulating the cotton preparatory to bleaching, and on the south side of this building is what is called the 'kier room,' and in this 'kier room' on either side thereof are located a number of vats or boilers into which the cotton is immersed into chemical baths, which vats extend above the floor in the kier room some few feet, large vats or boilers holding many hundred gallons, which extend down into a cellar underneath the floor, and the tops are placed on these vats or boilers loosely by handhold, which are even and on a level with with the floor with the kier room, and into these three vats or boilers steam and hot water are let by pipes which enter the bottom of these three vats or boilers, and in these three vats or boilers a boiling solution of chemicals is kept in which is nitric acid, sulphuric acid, lunar caustic, and other dangerous and poisonous chemicals, and in the process of manufacturing cotton it is placed in these vats or boilers. No railing is provided or other guard or protection around the tops of these vats, the tops of which are even with the floor as aforesaid, and these tops are the only means of preventing a person from falling into the same in the darkness or in the absence of light.

"The plaintiffs charge that the defendant V. L. Crawford, on the 3d day of March, 1916, and before and after that time, had a contract with his codefendant, the Meridian Light & Railway Company, who owned and operated an electric power plant in the city of Meridian, which contract was made by the said V. L. Crawford with the said Meridian Light & Railway Company for and on behalf of himself and his employees,

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who were employed to work in said manufacturing plant, one of whom was the said John W. Mullican, deceased, and to furnish electric lights and power for his (V. L. Crawford's) manufacturing plant, and for the benefit of his employees therein as aforesaid, and to operate the machinery used in said plant, the said manufacturing plant operated by the said V. L. Crawford was operated and driven by the electric power furnished by the said defendant, said Meridian Light & Railway Company, and by the dangerous agency of steam.

"And plaintiffs charge that this kier room with these vats of boiling chemicals as aforesaid was an exceedingly dangerous place to work, and that the tops of these vats were, of course, frequently removed, and had to be in order to immerse the cotton in them, and on account of the poisonous steam coming from them and the danger of falling into them, particularly at nighttime, the kier room was a most dangerous place to work, as both the defendants then and there well knew, and that V. L. Crawford, as employer of J. W. Mullican, deceased, was bound by law to make this kier room a reasonably safe place to work by day and by night, and said Mullican was employed to work there at night, and in order to make this kier room a reasonably safe place to work, Crawford, instead of performing the duty himself of lighting the room, in order to prevent his employees from falling into said vats and being hurt in said kier room, employed the said Meridian Light & Railway Company to perform this duty for him, the duty, as aforesaid, which he owed John W. Mullican, and both the defendants well knew that it was of vast importance, in order to make this room a reasonably safe place to work, that these lights be kept burning constantly in the night.

"Plaintiffs charge that they file herewith a copy of the contract so made by V. L. Crawford for and on

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behalf of his employees as aforesaid with the Meridian Light & Railway Company and make the same a part of this declaration the same as if fully copied herein.

"Plaintiffs further charge that said Meridian Light & Railway Company had for a long time furnished the electric current which lights this kier room where John W. Mullican was required to work for Crawford among these dangerous vats of boiling chemicals, and the conduct of said Mulican there and his work there was based in good faith upon his expectations that said Light & Railway Company would continuously perform its duty under its contract aforesaid with his employer and master on his behalf made as aforesaid, and would not permit their lights to go out during working hours of the night and thus render this kier room an unsafe place to work.

"Plaintiffs further charge that on said 3d day of March, 1916, said John W. Mullican being employed by the said V. L. Crawford in said manufacturing plant aforesaid, and being at the time in the room known as the 'kier room' in the performance of his duty, that is, the room where the tops of these three vats or boilers came up with the level of the floor, and over which vats the tops were placed as aforesaid on a level with the floor, and in the nighttime the electric lights in said plant, by the carelessness and negligence of said Meridian Light & Railway Company suddenly, on account of their defective machinery, and the carelessness or indifference of its agents and servants, were permitted to go out and left this room in darkness, and it so happened that just about this time, by the carelessness and negligence of said V. L. Crawford and his servants, the fellow servants of said J. W. Mullisan one of the tops of these three vats was left off and the vat was left open, and this vat was then full of a boiling solution made up of nitric acid, sulphuric acid,

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lunar caustic, and other dangerous and poisonous chemicals, and the said John W. Mullican in the discharge of his duty in said kier room went walking across the floor to secure a lantern to make a light in the darkness and fell into this open vat of boiling chemical compound, and there was cooked literally to death. He was soon rescued and pulled out and lingered for about one week, suffering in body and mind all the tortures, agonies, and pains of the lost, and the flesh fell away from his bones, and he died as a result of falling into said vat.

"Plaintiffs charge that the Meridian Light & Railway Company knew that this result was likely to follow, and had reason to anticipate such a result if they failed to comply with their contract, which was to keep lights continuously burning in said kier room during the night and that they well knew that said lights were furnished for the use and benefit of these employees and to make said kier room a safe place for them to work, as it was employed to do for said Crawford, for him and in his place.

"Plaintiffs further charge that it was then and there the duty of said Crawford to furnish his employees and John W. Mullican a safe place to work, and to keep and maintain said place so furnished him to work in a reasonably safe condition, and he breached this duty and was guilty of gross carelessness and negligence, in that the said three vats were so defectively constructed, as his codefendant well knew, that no safeguard or railing was provided around the top thereof, even with the floor as they were, or other means to prevent people from falling into the same when the tops were off, and also by the carelessness and negligence of his agents and servants by then and there leaving the tops off of said vat into which Mullican fell.

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"And plaintiffs further charge that it was then and there the duty of the Meridian Light & Railway Company, which it then and there owed the said V. L. Crawford and his said employee,, John W. Mullican, to keep and maintain lights in said kier room, and to keep them constantly burning, and it breached this duty and was guilty of gross carelessness and negligence in permitting its lights to suddenly go out then and there at the time Mullican fell into said vat, and that its lights went out because of the breaking down of its machinery, which was defective and worn out, and the lights were permitted to go out by the carelessness and gross negligence of its employees in failing to operate its plant so as to keep said lights continuously burning, as it had undertaken to do for the benefit of said Mullican.

"And so the plaintiffs charge that by the combined and joint negligence, which joint negligence was the proximate cause of Mullican's death, and by the joint negligence of said defendants as aforesaid, John W. Mullican was caused to fall into said vat and get burned to death as aforesaid, from which an action has survived to the plaintiffs, and they have been damaged, and also they have the right to demand damages for all pain and suffering endured by said J. W. Mullican as aforesaid, and all losses sustained by him;

"Wherefore they sue and demand judgment for actual and punitive damages in the sum of fifty thousand dollars against the said defendants, together with all costs of this suit."

The written contract between the Meridian Light & Railway Company and Crawford, in which the light company agrees to furnish electrical energy for power purposes at the plant of Crawford, is filed with the declaration as an exhibit, and is pleaded as a part of it. We here set out the contract between the light company and Crawford, which is as follows:

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"Contract.

"This contract and agreement made and entered into this the 1st day of February, 1915, by the Meridian Light & Railway Company hereinafter styled for convenience sake 'party of the first part,' and Mr. V. L. Crawford, hereinafter styled for convenience sake, 'party of the second part,' both of the city of Meridian, Lauderdale county, state of Mississippi, witnesseth:

"That the party of the first part hereby agrees to furnish to the party of the second part electrical energy for power purposes at the premises occupied by the party of the second part known as a 'linter washing and drying factory located on the Alabama Great Southern Railroad in the eastern part of the city of Meridian. Said electrical energy to be furnished for a period of three years from the date of signing of this contract at a rate of two and one-half cents per kilowatt hour, the amount of bill to be determined by the readings of an electrical meter or meters which the party of the first part will install in the building or premises owned by the said party of the second part.

"In consideration of this it is agreed that the party of the second part shall operate twenty-four hours per day two twenty-horse power motors and three five-horse power motors during the entire period of this contract. It is further agreed that in the event the party of the second part ceases to operate twenty-four hours per day, that this contract becomes void, and that the party of the second part will be furnished by the party of the first part electrical energy at its regular published rates.

"In consideration of the party of the second part paying its bills promptly on or before the tenth day of each month following that in which the service is rendered by the party of the first part, a discount of one-half cent per K. W. H. will be allowed to the party of the second part by the party of the first part.

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"It is further agreed by and between the two parties that the duly authorized agents of the party of the first part shall have free access to the motors and their connections which will be installed in the premises of the party of the second part at all hours and for any purpose.

"It is further agreed and understood that the party of the second part shall assume all risks for damages caused by defective wiring.

"It is also agreed that the party of the first part may have the privilege of removing its meters, and discontinuing furnishing service upon the failure of the party of the second part to pay said bills for electrical energy promptly when due.

"It is also agreed by and between the two parties that the party of the first part shall not be held liable on account of interruptions to service due to boiler explosions, lightning, cyclones, or other causes beyond its control.

"Signed in duplicate this the 1st day of February, 1915, Meridian Light & Railway Company, by [Signed] A. B. Patterson, General Manager. [Signed] V. L. Crawford."

The contract between Crawford and the light company having been filed as a part of the plaintiff's declaration, the plaintiffs rights must be determined by it with reference to whether or not the light company owed any duty to the deceased employee of Crawford. The declaration is to be construed most strongly against the pleader, and the character of the contract set out as a part of the declaration cannot be altered by any allegations or conclusions of the declaration. Therefore, whether there was such relationship between the deceased and the light company as imposed a duty of reasonable care by the light company toward him must be ascertained from the terms of the contract set out and relied upon by the pleading of the plain-

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tiffs below. In other words, if there be a conflict between the terms of the written contract and the allegations and conclusions of the declaration, the true fact will be taken to be in conformity with the contract pleaded in the declaration.

It is clear to us that the contract obligated the light company to do no more than to "furnish to the party of the second part electrical energy for power purposes at the premises occupied by the party of the second part, known as a 'linter washing and drying factory.'"

The contract imposed no duty upon the light company to furnish lights and keep them burning in the factory for the use and safety of the employees therein. No such service was promised or contemplated under the contract, therefore it necessarily follows that, since there was no such duty on the part of the light company toward the deceased, there can be no liability against it for damages on account of the unfortunate death alleged to have been caused by the extinguishment of the lights in the plant.

The appellant contends that the light company was the agent of Crawford, and as such agent negligently failed to keep the plant lighted as a duty owed to Crawford and the deceased employee, Mullican. We have reviewed exhaustively the authorities on the question of the liability of agents for negligence, in the performance of duties, to principals and third persons, and with much interest we have observed the distinctions made between acts of nonfeasance and misfeasance, or acts of omission and commission. We find our own court in *Feltus* v. *Swan,* 62 Miss. 415, held that a mere agent is not liable for an omission of duty except to his principal. This rule appears to be well established in the text-books and many decisions in other states. However, the more modern rule, which we think is based upon better reasoning, is that the relation of agency does not exempt a person from liability for

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an injury to a third person resulting from his neglect of duty for which he would otherwise be liable. This liability is not based upon the contractual relation existing between the principal and agent, but upon the common law obligation that all persons must so use that which he controls as not to injure another. But it must be borne in mind that this rule of liability always rests upon the question of the duty of the agent toward the injured party and his negligent disregard or violation of that duty, and that where no duty exists there can be no liability. It is the fact that the agent is guilty of a wrongful or negligent act amounting to a breach of duty which he owes to the injured person that makes him liable. It seems, therefore, that the modern rule tends to abolish the distinction between the agent's acts of commission and omission wherever such act involves a breach of duty. 21 R. C. L. 851; Story on Agency, section 309.

It is argued, in substance, by the appellant that the light company as agent of Crawford negligently failed to furnish lights continuously burning for the use and protection of the employees in the factory. This contention cannot be maintained, in our judgment, for the reason that there was no privity or other relation between the light company and the deceased which obligated the light company to furnish continuous lighting, or any lights whatever, in the factory.

Nor was there any common-law duty imposed upon the light company to furnish a safe and continuously lighted plant for the use and safety of the deceased. In truth, the light company here was not an agent of Crawford to furnish lights in the factory. It had no control or supervision over the lighting of the plant, but was a mere contractor to furnish electrical energy for power purposes at a stipulated price per kilowatt hour. Therefore, in view of the facts alleged in the declaration, there is no liability on the part of the

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light company for the unfortunate death of Mr. Mullican; consequently the judgment of the lower court as to the light company is affirmed.

As to the appellee Crawford, we think the lower court erred in rendering a judgment in his favor on the plea in bar setting up his discharge in bankruptcy. The motion, which was sustained by the court, for final judgment on this plea should not have been granted until the order of a stay of proceedings in the case had been set aside, and, even then, judgment on the plea should not have been allowed, since the plea concluded "to the country." It is true that this was merely a mistake in the form of the pleading, and the plea could have been amended to one of verification, which would have called for a replication, yet this was not done, and since the plea put at issue the fact pleaded by concluding "to the country," we are not willing to say that, while the pleadings were in this shape through no fault of appellants, and without waiver, the motion for a final judgment on the plea was proper. It appears that the plea was insufficient in law and form, and could have been stricken or answered either by demurrer or replication, but its conclusion "to the country" should have been under the circumstances considered as a joinder of issue, if valid at all for any purpose.

The judgment of the lower court as to the appellee Crawford is reversed, and the cause remanded; affirmed as to the appellee light company.

Affirmed in part, reversed and remanded in part.

ETHRIDGE, J. (dissenting).

I am compelled to dissent from that part of the opinion in this case which holds that the declaration did not state a cause of action against the Meridian Light & Railway Company. The cause having been decided on bill and answer, all the allegations of the bill are

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to be taken as true, and if they are true I think liability exists. A critical reading of the declaration set out in the majority opinion shows that the Meridian Light & Power Company had a contract with V. L. Crawford, which contract was made on behalf of himself and his employees who were employed to work in his manufacturing plant, among whom was the deceased, and that said Meridian Light & Railway Company was to furnish electric light and power for Crawford's manufacturing plant and for the benefit of his employees therein. It is further alleged that the kier room was an exceedingly dangerous place to work; that it contained boiling vats, the tops of which had to be frequently removed for the purpose of immersing the cotton, and that both of the defendants Crawford and the Meridian Light & Railway Company knew of the dangerous condition; that in order to make the said room safe for his employees it was his duty to have the premises properly lighted, and that, instead of performing the duty himself and preventing his employees from falling into the vats and being hurt in the room, Crawford employed the Meridian Light & Railway Company to light it for him; and that both defendants knew the importance of keeping these lights constantly burning at night. It further alleged that the Meridian Light & Railway Company had for a long time furnished electric current which lighted this kier where the deceased was required to work, and that Mullican acted in good faith upon the expectation that the light company would continuously perform its duty in the premises, and that Mullican was at work in the performance of his duty when the lights went out through the negligence of the Meridian Light & Railway Company on account of their defective machinery and the carelessness and indifference of its agents and servants, leaving the room in darkness. It further charged that the Meridian Light & Railway Company knew that the injuries of

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the kind complained of were likely to follow, and that it had reason to anticipate such a result as deceased's injury if it failed to comply with its contract and keep the lights continuously burning during the night, and that both of said defendants knew that the said lights were furnished for the use and benefit of the employees of Crawford and to make the kier room a safe place to work. It was further charged that it was the duty of the Meridian Light & Railway Company to keep and maintain the lights in the said kier room, and to keep them constantly burning, and that it breached this duty and was guilty of gross carelessness and negligence in permitting its lights to go suddenly out, and that the lights went out because of the breaking down of the machinery of the Meridian Light & Railway Company, which was defective and worn out, and the lights were permitted to go out by the carelessness and gross negligence of its employees in failing to operate its plant so as to keep said lights continuously burning as it had undertaken to do for the benefit of Mullican. An analysis of the contract made exhibit to the declaration shows that the manufacturing plant of Crawford was required to operate twenty-four hours per day two twenty-horse power motors, and three five horse power motors during the entire period of the contract. Under the contract the Meridian Light & Railway Company was to furnish Crawford with electrical energy for power purposes at the premises occupied by the linter washing and drying factory in the city of Meridian for a period of three years, at a reduced price per kilowatt. The contract further recites:

"It is further agreed by and between the two parties that the duly authorized agents of the party of the first part [Meridian Light & Railway Co.] shall have free access to the motors and their connections which will be installed in the premises of the party of the

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second part *at all hours and for any purpose.*" (Italics mine.)

In my opinion this contract in no wise contradicts the allegations of the declaration. It is well known that in cities the lights are generally furnished by electric light companies to business institutions and residences for hire, and it is well known that the same current that furnishes power is used for lighting and heating purposes. The same socket the light bulb is inserted in may be used to supply motion or heat. Electrical energy is adapted equally to all purposes above named, and may be transformed from one purpose to another by the simple expedient of changing the appliances from light to heat or motion, or *vice versa*.

The declaration alleges specifically that the Meridian Light & Railway Company was engaged in lighting the plant, and had been for a long time. This allegation is not contradicted by the contract at all.

I think this case falls within the principle announced by Chief Justice GRAY in *Osborn* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437. In this case Judge GRAY, who afterward was a member of the supreme court of the United States, states:

"If an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any erson who suffers injury by reason of his having so left them without proper safeguards."

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This principle is announced in this decision quoted from in Meachem on Agency (2d Ed.), sections 1465-1472, and this distinction is discussed and the distinction between nonfeasance and misfeasance clarified in 2 Corpus Juris, pp. 824-826, and *Lough* v. *Davis*, 30 Wash. 204-208, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848, and note; *Mayer* v. *Thompson-Hutchison Co.*, 104 Ala. 611, 16 So. 620, 28 L. R. A. 433, and note, 53 Am. St. Rep. 88; also *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Baird* v. *Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; *Cameron* v. *Mount*, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512; *Ward* v. *Pullman Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343, and note. See, also, *Ellis* v. *McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; *Consolidated Gas Co.* v. *Connor*, 114 Md. 40, 78 Atl. 725, 32 L. R. A. (N. S.) 909.

If the contract had never been entered upon by the Meridian Light & Railway Company, no one other than Crawford would have a right of action for the failure to perform the contract, but when the Meridian Light & Railway Company entered upon the performance of its contract it became responsible for injuries resulting from its wrong and negligence in the performance of the contract. The declaration shows that this place was highly dangerous, and that the manufacturer was manufacturing ingredients of high explosives, and that common prudence required the place to be kept lighted. It was the duty of the Meridian Light & Railway Company to furnish suitable machinery and appliances for the discharge of its contract; and, if it was using worn-out machinery, which was liable at any time to break down and leave this dangerous place unlighted, it was negligence for which it was liable.

COOK, J., joins in this dissent.

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McCULLAR & Co. v. MINK.

[83 South. 907, In Banc, No. 20928.]

1. PARTNERSHIP. *Suit must be by or against individual partners.* Partners cannot sue or be sued by the partnership name, but the suit must be by or against the individuals composing the partnership.

2. JUSTICES OF THE PEACE. *Refusal of circuit court on appeal to allow amendment by inserting names of partners held reversible error.* Under section 66, Hemingway's Code (Code 1906, section 86), providing that on appeals from justice of the peace the cause shall be tried *de novo*, and under section 558, Hemingway's Code (section 775, Code 1906), providing that the court shall have full power to allow all amendments to pleadings or proceedings at any time before verdict so as to bring the merits to trial, etc., a suit brought in a partnership name may be amended in the circuit court by inserting the names of the partners, and the refusal of the circuit court to allow such amendment on application therefor is reversible error.

APPEAL from circuit court of Prentiss county.

HON. CLAUDE CLAYTON, Judge.

Suit by McCullar & Co. against W. P. Mink, filed with a justice of the peace. Verdict for plaintiffs in part, and judgment thereon, and plaintiffs appealed to the circuit court, and from its judgment, dismissing the appeal, plaintiffs appeal. Reversed and remanded.

Jas. A. Cunningham, for appellant.

Courts of law are organized, for the purpose of trying causes upon their merits, and only in exceptional cases should the trial court refuse to permit amendments of pleadings so as to bring the merits of a controversy to a fair conclusion. *Greenwood Grocery Co.*

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v. *Bennett,* 58 So. 482; also Hemingway's Code, section 558.

When the point was raised by the appellee that the plaintiff stood in the firm name and the form questioned, then in the furtherance of justice, the trial court should have allowed the amendment so as to bring in proper parties, namely, the individual members of the co-partnership. *Jones et al.* v. *Clemmer & Son,* 54 So. 4.

The learned trial court evidently mistook the effect of the holding in. *Lewis et al* v. *Cline et al.,* So. R. 5, page 112. Where a demurrer to a similar declaration was sustained by the trial court, but it is important to notice that no application was made to amend, and Chief Justice ARNOLD, in reference to this, laid special emphasis on the absence of an application to amend. We would cite as a general authority on this proposition, 21 R. C. L., Sec. 134, also 1 Encyclopedia Pleading & Practice, page 466.

In view of the authorities above cited, it is perturbing to us to perceive how the learned trial court could allow this case to go off at the springing of the trigger of a technicality, and to allow the merits of the cause to be consigned to oblivion.

We earnestly insist that justice demands a reversal of this cause.

E. C. Sharp for appellee.

"At common law the process and pleadings in every action were required to disclose the first name and surname of all parties thereto, the purpose being to render judicial procedings certain and conclusive as between the parties, and to give full force and effect to the doctrine of *res judicata.* The requirement that the names of all parties has always been adhered to in

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suits by partnerships, except where modified by statute. Hence the general rule is that partners cannot sue in the firm name but all actions must be brought in the individual name of the partnership." 15 Enc. Pl. & Pr., 1, pages 839-840; 20 R. C. L., sec. 133; *Blackwell* v. *Reed*, 41 Miss. 102.

This rule has been modified to a limited extent in this state by section 515, Hemingway's Code of Miss. By this section "actions on written instruments, the defendant may be sued by the initial letters or contraction of the christian name, used by him in his signature to such writing." But nowhere do we find where the necessity for the disclosure of the names of the partners may be dispensed with in the bringing of a suit.

In the case of *Grocery Company* v. *Bennett*, 58 So. 482, cited by appellant we find that the question there decided was based upon the pleadings in an attachment case and that there was a special statute controlling the decision in that case and which statute allowed amendment in an attachment suit and has no application to the case at bar.

"After witnesses have been examined the court will not, unless under very special circumstances, or in consequence of some event, allow the bill to be amended, 1 Enc. Pl. & Pr., page 482.

"An action improperly brought in a firm name may be dismissed on motion, or an objection to its maintenance may be raised by demurrer for want of capacity to sue." 15 Ency. Pl. & Pr., page 480. Therefore I submit that this case should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

McCullar & Co. filed a suit on an open account with the justice of the peace against the appellee for goods, wares, and merchandise, amounting to ninety-six dol-

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lars and twenty-four cents balance. The affidavit to the account recited that—

"L. B. McCullar, of McCullar & Co., who, being duly sworn, says the account hereto attached for ninety-six dollars and twenty-four cents is correct as stated, and same is due from the party against whom it is charged, and that no part of it has been paid."

The account does not show upon its face who constituted the firm of McCullar & Co.; but no point was made in the justice court on the failure of the account to so state. Munk filed a counter affidavit, specifying items in the account which he did not owe, and concludes his affidavit as follows:

"That he owes the said McCullar & Co. the sum of eight dollars and fifty-five cents and has paid same into the court, and that but for said amount he owes none of said account, save the items not included in this affidavit."

The jury in the justice court found for the plaintiffs for one-half of the amount sued for, and judgment was entered, from which judgment the plaintiffs appealed to the circuit court. When the circuit court convened the defendant moved the court to dismiss the case, for the reason that suit is brought in the name of the partnership, and not in the names of the individuals constituting the partnership, and that nowhere does it appear in the record what the names of the partners are, or who McCullar & Co. are. Thereupon the plaintiffs asked leave to amend, to show who McCullar & Co. consist of, by inserting the proper names composing the partnership, which motion of the plaintiffs to amend was by the court overruled, and the motion of the defendant to dismiss was sustained, from which judgment, dismissing plaintiffs' suit, this appeal is prosecuted.

Section 66, Hemingway's Code (section 86, Code of 1906), provides that on appeal from a justice of the peace court to a circuit court the case shall be tried

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anew in a summary way without pleadings in writing, etc. Section 558, Hemingway's Code (section 775, Code of 1906), reads as follows:

"775. Amendments Allowed.—The court shall have full power to allow all amendments to be made in any pleading or proceeding at any time before verdict, so as to bring the merits of the controversy between the parties fairly to trial, and may allow all errors and mistakes in the name of any party or in the form of the action to be corrected; and the court shall require all such amendments to be made on such terms, as to costs and delay, as may be proper to prevent surprise or undue advantage. Either party may except to the decision of the court allowing or refusing amendments, and the same may be assigned for error."

In *Greenwood Grocery Co.* v. *Bennett,* 101 Miss. 573, 58 So. 482, 598, this court held that under section 775, Code of 1906, above set out, it was error, on a motion to quash an attachment because the bond did not describe plaintiff as a corporation, to refuse to permit plaintiff to amend. The court in that case said:

"It seems clear that the plaintiff should have been allowed to amend the attachment proceedings, or to have filed a new bond and affidavit. An amendment should have been allowed to all of the defects which we have not mentioned in the statement of the case. Courts of law are organized for the purpose of trying causes upon their merits, and only in exceptional cases should the trial court refuse to permit amendments of pleadings or proceedings."

The appellee relies upon *Lewis* v. *Cline,* 5 So. 112, and *Blackwell* v. *Reid,* 41 Miss. 102. In the last case it was held that partners could not sue and be sued in the partnership name, and in the case of *Lewis* v. *Cline, supra,* it was held that a declaration not showing who constituted the members of the partnership suing in the partnership name is demurrable. The question of amend-

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ment or the power to amend was not decided adversely to the contention of the appellant in this case. Of course the declaration or account, not showing the persons composing the partnership, was subject to demurrer; but, on application to amend, the amendments should be allowed, section 775, Code of 1906 (section 558, Hemingway's Code). The court, therefore, erred in refusing to allow the amendments, and in sustaining the motion to dismiss, and for these errors the cause is reversed and remanded.

Reversed and remanded.

CROSSETT LUMBER CO. v. LAND.

[In Banc. No. 20951.]

1. MASTER AND SERVANT. *Failure to instruct experienced employee appreciating dangers held not negligence.*

The employer is not bound by law to give instructions to an employee who from intelligence and experience, or knowledge, is able to appreciate the dangers of the employment he has undertaken.

2. MASTER AND SERVANT. *Danger from creosote flying into eye obvious and a hazard of employment.*

The danger of injury to an experienced employee from creosote flying into his eye while superintending the driving of a creosoted stave in the groove of a silo was obvious from ordinary observation, and was a hazard incident to the employment.

3. MASTER AND SERVANT. *Failure to instruct experienced servant of obvious danger not negligence.*

The failure of the employer to instruct the employee who was an experiened builder in charge of building a silo, that creosote would injure his eye if it flew into it from a driven stave, was not negligence in the employer.

4. MASTER AND SERVANT. *Injury to eye of unwarned but experienced employee by flying creosote held accident resulting from his imprudence.*

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The injury to the eye of the competent and experienced employee by creosote contact, under such circumstances as above, was not caused by the negligence of the employer, but was an accident resulting solely from the imprudence of the employee.

APPEAL from chancery court of Panola county.
HON. J. G. McGOWEN, Chancellor.

Suit by attachment by J. W. Land, administrator, against the Crossett Lumber Company and others named as garnishees. Decree for plaintiff for two thousand dollars, and defendant appeal. Reversed, and judgment entered for defendant.

J. B. Corothers and *F. W. Montgomery,* for appellant.

Stripped of its judicial embellishment, complainant's first allegation of negligence is, that the lumber company failed to say to him when it employed him as superintendent to erect these silos, or superintend their erection, and furnished him among other things for use "a substance composed largely, perhaps wholly, of creosote," "Land, it will injure your eye if you get any of this wood preservative in it, and you should apply it so as not to allow any to get in your eye," and that such failure to so warn him, constituted actionable negligence.

In view of the settled law in cases of this character, this allegation of negligence, and the evidence tending to support it, constitute a legal absurdity. Land was an intelligent man, possessed of a fair education; he was thirty-five years old; not an ordinary laborer, but a "contractor and builder." He admitted having had more than ten years actual experience in all kinds of construction work, and had handled and was familiar with all kinds of building materials, including paint, etc. He was employed as an experienced builder, and recommended himself as being fully capable of taking

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charge of and building their silos. There was nothing to put the lumber company upon notice that he was not fully competent to handle the situation, and was not aware of any ordinary dangers incident to his employment. The law on this subject can be stated as follows:

"No duty rests upon a master to instruct a servant as to the probable dangers of the employment where he is mature, intelligent and experienced in the work, and the master has no notice that he is not fully competent and acquainted with such dangers." *King* v. *Morgan,* 48 C. C. A. 507; *North Ala. etc., Co.* v. *Beacham,* 37 So. 227; *Am. Malting Co.* v. *Lelevelt,* 101 Ill. App. 320; *Peterson* v. *New Pittsburg Co.,* 63 A. S. R. 289; *Republic I. & S. Co.* v. *Ohler,* 68 N. E. 901, 161 Ind. 260; *Labelle* v. *Inh. of Montague,* 54 N. E. 859; *Brundige* v. *Dodge Mfg. Co.,* 66 N. E. 604; *Burton* v. *Harvard Brewing Co.,* 67 N. E. 356; *O'Keefe* v. *John P. Squire Co.,* 74 N. E. 340; *Omaha Bottling Co.* v. *Theiler,* 80 N. W. 821, S. C., 80 A. S. R. 673; *Weed* v. *Chicago, etc., R. R.,* 99 N. W. 827; *Saucier* v. *N. H. Spring Mills,* 56 Atl. 545; *Tompkins* v. *Marine Eng. & Mac. Co.,* 58 Atl. 393; *Moose, etc., Co.* v. *Richardson,* 28 So. 334; S. C. 664 A. S. R. 785; *Sandquist* v. *Ind. Tel. Co.,* 80 Pac. 539.

And in 1 Labatt's, Master & Servant, sec. 245, the rule is stated in this language: "An obvious corollary of the general principle stated in section 238, *supra,* is that a master is not bound to give instruction to a servant who has acquired sufficient special knowledge to enable him to appreciate the perils of the employment which he had undertaken" and again the rule is stated in *Hanel* v. *Obrigekewitsch,* 168 N. W .45, 2 A. L. R. 1029, as follows: "An employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience, and with

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the same capacity for estimating their significance, would see and understand." 18 R. C. L. 570.

And in the case of *Railroad Co.* v. *Downs*, 102 Miss. at page 142, Justice REED in delivering the opinion of the court, states the rule in this language: "It was not incumbent upon the appellant to give any warning and instruction to appellee regarding any dangers or perils connected with the work in which he was engaged. Such dangers were ordinary hazards, patent to the average workman, or such as were easily discoverable in the exercise of ordinary intelligence and care. The proof shows that appellee was not without experience in the work of a section hand about railroad tracks and road beds, and that the work then being done was not unusual, but was ordinary. From the facts in evidence we believe the appellant could have rightfully assumed that appellee possessed such experience and judgment ordinarily found in workmen of his grade, and that he was reasonably skilled in the work he was undertaking.'

Both the pleadings and evidence in this case showing that complainant was mature, intelligent and experienced, and according to his own statement, was fully capable of doing the work, not as a mere laborer, but as superintendent, which he was employed to do, there was no want of prudence and caution on the part of the defendant in failing to advise him that particles of the "dope" as it was termed by the complainant, or liquid furnished to treat the ends of the staves before joining them together, would injure the eye by contact and to so use the same as not to permit it to get into his eye.

We submit that there is nothing in the allegation of negligence above discussed, nor in the evidence tending to sustain the allegation, which would in law require the defendant to have given the complainant such a warning. The authorities which we have above cited completely refute this contention.

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II. We take it also that the court will readily hold, that the chance or risk of particles of the liquid wood preservative, disadhering to the wood and coming in contact with the mechanic or workman applying same, is such an obvious and patent hazard as to dispense with the necessity in any case with warning by the employer. The law undoubtly charges an experienced workman of maturity and intelligence, with knowledge that particles of liquid substance being applied to a structure such as this, would likely not adhere, or disadhere to the structures, and adhere to the person of the workman. A workman of a very low order of intelligence even would know this, to say nothing of a person possessed of sufficient knowledge and experience to act as superintendent of a job.

The rule of law is stated by Justice COOK in the case of *Y. & M. V. Ry.* v. *Hellum,* 119 Miss. 229, as follows: "It is elementary law, that employees assume the obvious risks incident to their employment." *N. O., etc., Ry. v. Hughes,* 49 Miss. 258; 1 Labatt's Master & Servant, sec 238; 1 Labatt's Master & Servant, sec. 239.

The principle of law announced by Justice COOK, in the case of *Y. & M. V. Ry.* v. *Perkins,* 108 Miss. 111, 66 So. 273, fits perfectly the facts in this case in this respect. I quote from the opinion of the court in the Perkins case at page 119 and 120: "It is perfectly manifest that appellant was a skilled carpenter and had constructed a great many scaffolds like the one in question; that he knew all about how they ought to be constructed to make them safe; that the instructions given by the assistant foreman, were of the most general and perfunctory character, no doubt because the foreman knew that appellee was qualified to do this sort of work without any advice from him. It would not be unfair to to say that appellee, knowing the danger, voluntarily elected to take chances; but aside from this view of this

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case, we ase forced to the conclusion, taking the record in its most favorable aspect, that as a matter of fact the scaffold was changed by appellee himself, and that no specific commands or instructions as to how the work was to be done were intended to be given by the assistant foreman. Indeed, the work was of the simplest kind, and the foreman did not limit the workman as to the method of performing it, and at most he only made a suggestion which appellee was at liberty to accept or ignore as he saw fit. There is nothing in the record to justify the idea that the foreman directed the manner of doing the work, in any proper sense, nor does it appear that he saw the work done; but on the contrary it appears that appellee supervised the work and in one particular he attempted to improve the foreman's suggestion.

It is, of course, the duty of the master to provide a reasonably safe place for the servant to do his work, and this duty is nondelegable; but when the workman himself is doing the work for his own safety, and neglects to take the simplest precautions to insure his own safety, which he might have taken without violating his general instructions, his failure to take the precautions is his own neglect, and not his master's."

Let us never lose sight, in considering this case, of the important fact that complainant was not an ordinary laborer, but the superintendent, whose duty it was to plan and direct the laborers in the performance of the details of the work. The evidence offered on behalf of the complainant in this case completely refutes the allegation in complainant's bill that he was not negligent in the performance of his duty; but shows conclusively that his failure to observe the simple precaution of dipping the staves before joining them, about which he had been given no instruction, and the doing of which would not have been in violation of any instruction which

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he had received, was the sole cause of his injury. As superintendent of the job, complainant should have required Will Hellums to let the surplus fluid drip off the end of the stave before driving it in the groove. This would have required only a moment, and would have obviated the injury. It was peculiarly complainant's duty to see that this was done.

IV. But viewing the case as a whole, on the pleadings and evidence, it seems to us the most plausible explanation of the injury, is that it is one of those deplorable accidents, which resulted in very serious injury to complainant, but for which no one is responsible. The case of *Railroad Co.* v. *Blockman,* 87 Miss. 192, 39 So. 479, is directly in point here.

We specially refer the court to the excellent brief of eminent counsel for the appellant in the Blockman case, and the decisions cited by Justice CALHOUN at page 203, in support of his opinion.

And again, in the recent case of *Miss. Central R. R. Co.* v. *Bennett,* 111 Miss. 163, which was a suit for damages for an injury to the eye caused by a flying particle of iron finding lodgment in the eye of a blacksmith who was engaged in cutting an iron rod, this court, through Chief Justice SMITH, re-stated the rule announced in the *Blockman case, supra,* in the following language: "On the evidence it seems clear that appellee's injury was the result of an unfortunate accident for which no one was to blame unless it was the helper, who according to appellee should not have struck the anvil in breaking the rod, but should have struck the rod only. The peremptory instruction requested by the appellant should have been given."

Courts of last resort in other states are in line with the decisions of this court in the Blockman and Bennett cases, supra. The supreme court of Kansas, in the case of *A. T., etc., Ry.* v. *Weikal,* 84 Pac. 720, lays down this rule: "For an employer not to warn a machinist's

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helper who has been such for months and is a young man of intelligence, of the danger of chips flying when Steel is cut with a chisel, is not negligence. The danger being obvious and assumed."

And in the case of *Wolf* v. *New Bedford Cordage Co.*, 76 N. E. (Mass.) 222, the court says: "A master is not bound to instruct an apprentice machinist that if certain steel needles or teeth on an endless chain broke on coming in contact with a crowbar the pieces might fly; the danger being an obvious one." See also *Rodley* v. *Shapiro,* 99 N. Y. S. 1077.

Summary. We respectfully submit the decree of the learned chancellor who tried this case was incorrect, should be set aside and reversed and a decree entered in this court for appellant for either or all of the following reasons:

(A) The complainant was a man of maturity, intelligence and experience, was employed as a superintendent by reason of these qualities, and the lumber company had no notice or reason to believe he was not fully competent and acquainted with the ordinary risks and dangers incident to the employment.

(B) The injury to him was manifestly the result of a risk or hazard which was obvious and patent to him when he accepted the employment, one which he voluntarily assumed, and for which he was paid.

(C) The injury to complainant was not the proximate result of carrying out any specific instructions of Parnell, but was the proximate result of his own failure to take the simplest precaution to prevent the injury to-wit: To require his helper to let the stave drip momentarily before driving it in the groove, in order to get rid of the surplus of wood preservative. This is a precaution which he could have taken without violating any general instructions from Parnell, and as superintendent it was his duty to see that all

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necessary precautions were taken to prevent injury to workmen and himself in executing general orders.

(D) The injury to complainant was an accident pure and simple, and does not give rise to a cause of action.

"The effect of the accident to complainant is very deplorable indeed; but whether the appellant is liable in damages is a question of law, and not of sympathy." *Railroad Co.* v. *Blockman, supra.*

L. B. Lamb, for appellee.

The fact that there was an order from the substance was no warning of danger. Many properties have an offensive odor and yet would be harmless to the skin or eye. Masters will be presumed familiar with latent as well as patent dangers, ordinarily accompanying the business in which he is engaged. *Wagner* v. *Jayne Chemical Co.,* 20 A. S. R. 745. The court in that case at page 749 says: "The fact that the fumes of nitric acid may be perceptible to the senses is conclusive of nothing. The court could not say, as a matter of law, that every odor is a warning of danger."

Knowledge of dangers likely to arise from the use of dangerous substance is not imputable to the servant in the absence of special experience or instruction. *Pigeon* v. *W. P. Fuller & Co.,* 159 Calif. 691; *Fox* v. *Peninsular W. Lead & Color Works,* 84 Mich. 676, 48 N. W. 203; *McCray* v. *Sterling Varnish Co.,* 7 Pa. Super. Ct., 610; *Texas & N. O. R. Co.* v. *Gardner,* 29 Tex. Civ. App. 90 69 S. W. 217.

Mr. Land, the servant in this case, was an inexperienced man in the business in which he was engaged when injured, and wholly ignorant of the highly dangerous qualities of the substance that put out his eye, and the master knew he was ignorant and inexperienced. Yet no sort of warning was given him. Instead of a warning as to the danger in handling this

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stuff he was ordered to use it in a way that made it more dangerous.

The servant here was not negligent. He had no knowledge that the stuff was dangerous. This is not denied or contradicted by any sort of proof. Even if he had known that the stuff was dangerous that would not relieve appellant, but he did not know it because it will cause temporary inconvenience to get any foreign substance in the eye does not convict Mr. Land of any negligence, if it be granted that any foreign substance will cause damage to the eye. There are many substances that have as bad odor as this preservative had and that have about the same consistency and appearance that would not put out an eye or blister the skin.

Counsel blow hot and then blow cold. They say that when Mr. Land began to apply this mixture by dipping the ends of the staves in the can or bucket, that he must have known that some of it would be caused to fly on his person when the staves were driven up. Yet they argue that the occurrence was an accident, and cite *Railroad Company* v. *Blockman,* 87 Miss. 192.

If Mr. Land had known the stuff was dangerous he might have done the work properly and yet avoided injury. But when he was ordered to apply the preservative by dipping the staves in the bucket the danger to him was enhanced greatly, this being confessed by counsel for appellant.

We have the master, knowing the stuff was dangerous, ordering the servant to use it in a way that would certainly cause more of it to fly from the staves and onto his person. This was calculated to lull the servant into a feeling of security even if he had any cause to apprehend any danger. While the injury may not have ben a necessary result of the dipping, it was a most probable one. None of the substance had got on the person of Mr. Land before the injury, and he had been

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using a brush to apply most of the time; in fact had been dipping the staves but a short time.

In the Blockman case cited by counsel for appellant and referred to above it was held by this court that no unsafe appliance was furnished, and that event was extremely improbable and not to be foreseen; that, while the danger in the beginning of the operating was not apparent to the engineer, the superior officer, the fireman, the injured person, could have avoided the injury by turning his head after he saw the splinters fly from the file. The servant in that case saw and perceived the danger and could have prevented the injury by turning his head. In this case Mr. Land had no sort of warning of any danger until he was injured. He had no opportunity to avoid injury. Blockman did have that chance. The Blockman case was decided before Acts of 1910 and 1914.

Counsel refer to case of *Miss. Cent. R. R. Co.* v. *Bennett*, 111 Miss. 163.

There was no negligence on the part of the master. The servant there was not furnished with a defective tool to work with. The part of the anvil being used was in good repair and not defective.

Counsel refer to the case of *Y. & M. V. R. R. Co.* v. *Hellum*. 119 Miss. 229. Quoting the expression that employees assume the obvious risk of the employment, that rule does not obtain where the master is negligent. Where the master is negligent there is no assumption of risk in this state, so the Hellum case has no application here.

It is the non-delegable duty of the master to furnish the servant with a safe place to work, and with safe appliances to work with. The servant does not assume the risk of his employment when the master is negligent.

This is well settled by our decisions, this question having been frequently passed upon by this court. I

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respectfully refer the court to the following cases which are familiar to the court: *Benton* v. *Kinkbind Lbr. Co.,* 118 Miss. 558; *Sea Food Co.* v. *Alves,* 117 Miss. 1; *Huff* v. *Bear Creek Mill Co.,* 116 Miss. 509; *Edwards* v. *Lumber Co.,* 113 Miss. 383; *Murray* v. *Drug Co.,* 110 Miss. 261; *Parker* v. *Wood Lumber Co.,* 98 Miss. 751; *Railway Co.* v. *Broome,* 97 Miss. 201; *Railroad Co.* v. *Wiley,* 88 Miss. 825; *Railroad Co.* v. *Gill,* 88 Miss 417. In the case of *Murray* v. *Drug Co.,* 110 Miss., the court at page 269 say: "This suit is bottomed on the nondelegable duty of the master to furnish the servant a safe place in which to work. This court has said on this subject in the well-considered case of *A. & Ry. Co.* v. *Groome,* 52 So. 703, through Justice SMITH: "The duties of the master relative to furnishing the servant a safe place in which to work cannot ordinarily be delegated to fellow servants, and the risk relative thereto is not such as is ordinarily assumed by the servant.'"

This is a correct announcement of the law on this subject, and as a matter of law, therefore, on the facts of this case, no assumption of risk nor contributory negligence can be charged against deceased employee. It was the duty of the master to use every reasonable effort to see that the place in which these employees worked was safe, and they had a right to assume that this duty would be strictly complied with. Besides which even if the doctrine of contributory negligence and the assumption of risk could be invoked, it is equally clear on the testimony which we have set out that whether the deceased employee was guilty of contributory negligence or assumed the risk was a question of fact for the jury and not for the court." So, under chapter 156, Laws of 1914, page 200, and the many decisions of our court, the doctrine of assumption of risk cannot be availed of in this case by appellant, nor can it escape on account of mere contributory negli-

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gence on the part of Mr. Land even if he had been guilty of such.

The fact that place or appliance or substance is unsafe and obvious and known to the servant does not relieve the master of liability. A wilful use of appliance or place or substance in such a way as a reasonable man would know would certainly result in injury, might bar a recovery, but mere use of place, appliance or substance with knowledge of danger or defect would not. *Sea Food Co.* v. *Alves,* 117 Miss. 1.

Counsel argue that a man of ordinary sense would have known that this preservative would fly from the staves when they were being driven, up and onto any person or object nearby; that this was a necessary and inevitable result from dipping the staves and driving them up. If so, the master knew this and the occurrence was not an accident, something that could not have been foreseen.

But they argue that Mr. Land was negligent in placing himself where the stuff could fly onto his person. He was not negligent because he had no knowledge and had no reason to suspect that the preservative would injure him if it did get on his skin or into his eye.

But if he was negligent under Laws of 1910, chapter 135, par. 502, Hemingway's Code, and the decisions thereunder, and above cited, appellant would still be liable. Mere contributory negligence would not be a bar to recovery.

In the case of *Railroad Co.* v. *Gill,* 88 Miss. 424, this court held before the passage of the Acts of 1910 and of 1914 that a servant was entitled to recover for injuries received by getting creosote in his eyes. He was not informed by the master of the danger and had no knowledge himself. I respectfully submit that this case should be affirmed. I think the complainant below would have been entitled to a peremptory instruction if the case had been in circuit court, but if not and the

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question of the liability of the master was one of fact, then the learned chancellor below found the facts in favor of complainant, appellee's intestate, and that finding should not be disturbed.

The decree was hardly compensatory, and if the unfortunate servant was in any sense negligent, that has been charged for in the decree rendered. But I submit the master was negligent, the servant was not, and was injured by the negligence of the master and is entitled to recover therefor.

HOLDEN, J., delivered the opinion of the court.

This is a suit by attachment in chancery against the appellant, Crossett Lumber Company, a foreign corporation, and certain other persons named as garnishees.

The appellant, Crossett Lumber Company, was engaged in the business of manufacturing, selling, and constructing silos. The complainant, Land, a man thirty-five years of age, was a contractor and builder by profession and trade. He had been engaged in his trade as carpenter and contractor for about ten years prior to the injury complained of in this case. He was a man of considerable education and experience. The appellant company employed him to superintend the building and construction of certain silos at different points. A book of instructions was furnished him showing the proper method of constructing a silo. Amongst other things in the book was a reference to the use of a certain preparation of asphaltum and creosote substances to be applied to the bottom of the staves to be used in the building of silos.

The complainant, Land, in the course of his employment as superintendent of the construction of the silos, was instructed that the ends of the staves resting upon the cement foundation of the silo should be creosoted

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before the staves were driven to their places in the grooves of the silo. At first the creosote was applied to the ends of the staves with a brush; but, this method of application proving faulty in the erection of one of the silos, the agent of the appellant company instructed Land to dip the ends of the staves in the creosote instead of using the brush. In pursuing this method a stave was dipped about six inches into the bucket of creosote preparation, and, before it drained off, *was* placed in the groove and was struck by one of the employees working under Land, and driven into its grooved place, whereupon a drop of the creosote preparation flew from the stave into the eye of the appellee, permanently impairing his eyesight, for which injury the trial court awarded a decree for two thousand dollars.

The suit for the injury is predicated solely upon the ground that the appellant company was negligent in failing to instruct Land that the creosote preparation used on the ends of the staves was dangerous in its use and would injure him if it should fly off of the staves into his eye; and that the failure to inform him of this danger, coupled with the fact that the agent of the appellant company had instructed Land to dip the ends of the staves in the preparation, instead of putting it on with a brush, and thereby causing a surplus quantity of the preparation to accumulate on the ends of the staves thus making it possible for it to fly off into his eye, constituted negligence on the part of the appellant company, and caused the injury complained of.

The testimony in the record is undisputed that at the time of the injury Land was acting as superintendent of the work and had full control and direction of the dipping of the staves in the creosote and the driving of them into the groove position. When the stave was struck and driven by the employee, under Land, he failed to shut his eyes or turn his head away from

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the creosote stave, and a drop of the creosote flew into his eye. The agent of appellant company was not present at the time of the injury.

It appears without dispute that Mr. Land was a man of intelligence and had many years or experience as a contractor and builder; therefore we think he not only was bound to know that the preparation used on the staves contained creosote, because he could see and smell it, but in addition to this it is shown that the book of instructions, which he testified that he had read carefully, specifically called his attention to the use of the creosote preparation on the ends of the staves in the construction of the silos. Undoubtedly, Mr. Land must have had, under these circumstances, definite knowledge that the preparation he was using on the staves contained creosote which would burn the skin or injure the eye if any portion of it should come in contact therewith.

It is further shown by the undisputed proof that Mr. Land was experienced in building and construction works, and was competent; therefore it is reasonable to conclude that ordinary observation would have made obvious the danger incident to the use of the creosote preparation.

The employer is not bound by law to give instructions to an employee who from intelligence and experience, or knowledge, is able to appreciate the danger of the employment which he has undertaken. The danger here was an ordinary hazard of the employment, of which the appellee must have had knowledge. He not only knew of the danger from the common observation of an experienced and intelligent person, but he had knowledge from the discussion of the use of the creosote in the book of instructions which he had read and followed in his employment.

We do not think that the appellant company was guilty of negligence under the proof in the case. It was

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an unfortunate accident, which probably might have been avoided had the appellee been more prudent. *Railroad Co.* v. *Downs,* 109 Miss. 142, 67 So. 962; *Hanel* v. *Obrigewitsch* (N. D.), 168 N. W. 45, 9. A. L. R. 1029; 18 R. C. L. 570; Labatt's Master and Servant, vol. 1, section 239; *Y. & M. V. R. R. Co.* v. *Perkins,* 108 Miss. 111, 66 So. 273.

In view of the conclusion reached above, the decree of the lower court must be reversed, and judgment entered here for the appellant.

Reversed, and judgment here for appellant.

BOX v. STRAIGHT BAYOU DRAINAGE DIST.

[In Banc. No. 21169.]

1. COURTS. *Drainage district proceeding in chancery court is a "pending suit" within statute creating new county.*

Under section 13, chapter 348, Laws 1918, creating Humphreys county, proceedings for the establishment and maintenance of a drainage district instituted in the chancery court of Yazoo county, under chapter 269, Laws 1914 (section 4434 et seq., Hemingway's Code), are judicial and constitute a "pending suit."

2. COURTS. *Jurisdiction not lost by exclusion of land from chancery court district.*

The chancery court obtaining jurisdiction of a drainage district under Laws 1914, chapter 269 (section 4434 et seq., Hemingway's Code), does not lose its jurisdiction because the land embraced in the drainage district is subsequently placed in another county in a different chancery court district.

ETHRIDGE, J., dissenting.

APPEAL from chancery court of Yazoo county.

HON. LAMAR F. EASTERLING, Chancellor.

From a decree affirming and approving an assessment by the Commissioners of the Straight Bayou Drainage District, C. B. Box appeals. Decree affirmed.

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Wise & Bridgeforth, for appellant.

It has been agreed, between the appellant and the appellee that the sole question involved in the contest of the assessment of betterments is the right of the chancery court of Yazoo county to proceed in the premises—the question whether or not the chancery court of Yazoo county now has jurisdiction to administer and supervise the affairs of the Straight Bayou Drainage District, no part of the said district now being situated in Yazoo county.

The Legal status of the Straight Bayou Drainage District. The Straight Bayou Drainage District, under the provisions of chapter 195 of the Laws of 1912, and chapter 269 of the Laws of 1914, is a body corporate, and has the power to contract and be contracted with, to sue and be sued, plead and be impleaded, etc. The administration of its affairs is in the hands of commissioners, responsible to, and acting under the direction of the chancery court of Yazoo county. Because of the fact that it was situated, at the time of its creation, partly in Yazoo and partly in Sharkey county, such a district is a *quasi*-public or *quasi*-municipal corporation. 9 R. C. L. 644; 14 Cyc. 1026; *Connell* v. *Woodard,* 5 Howard (Miss.) 665, Am. Dec. 173.

Municipal and *quasi*-municipal corporations are created in one of two general ways, either by a special statute, directly creating the particular corporation, or by the acceptance of and compliance with certain preliminary forms provided in a general law, for the creation of such corporations. Drainage districts in all states are created under the latter method, and chapters 195 of the Laws of 1912, and chapter 269 of the Laws of 1914, provided the requirements and forms to be met and complied with in the state of Mississippi, in order to create such districts. Section 1 of chapter 269 of the Laws of 1914, and subsequent sections of the same act prescribe, in minute detail, the steps to be taken,

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and where the territory embraced in the proposed district is situated solely in any one county, delivers the jurisdiction to supervise and control the affairs of the district to the board of supervisors of the county, but provides that, where the district is situated in two or more counties, the control and supervision of the affairs of the district are to be delivered to the chancery court, or the chancellor, of any county in wsich a part of the district is situated.

The Straight Bayou Drainage District was organized by the chancery court of Yazoo county, and its affairs controlled by the chancery court of Yazoo county, because of the fact that, at the time of its creation, it was a bi-county district.

The Jurisdiction of the Chancery Court. The chancery court of Yazoo county obtained its jurisdiction, not by terms of the general statute prescribing its general jurisdiction, and not by inheritance from the powers of the higher court of chancery in England, but by the terms of the special drainage district acts. It is significant that its powers to regulate and control the commissioners of a drainage district, and supervise the drainage district's affairs, where the district is situated in two or more counties, are commensurate only with the powers of the board of supervisors, when the district is situated only in one county. Plainly, the chancery court is here acting only as an administrative board, just as the board of supervisors would act when exercising the same functions. The drainage laws further provide that, on contest of the location of drains, assessments of betterments, etc., appeals may be taken from the decision of the board of supervisors in single county districts to the chancery court of the county—plainly a new jurisdiction as a court is here conferred upon the chancellor of the county wherein the district is situated. When appeal has been taken from the decision of the board of supervisors, he

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then hears the matter as a court, and not as an administrative officer, and his functions in this case are peculiarly different from those where the court has only the same control exercised in bi-county districts that the board of supervisors had in single county districts. In bi-county districts, on contest, the drainage acts provide for appeal to the supreme court when, in like manner, a contest having been started, the supreme court, as a judicial body, hears a contested and litigated case, while the chancellor was only acting, until contest was made as an administrative officer.

It is believed by the appellant that this distinction must be carefully borne in mind. Under the drainage acts, only the chancery court of a county wherein a portion of the district is situated has jurisdiction, and this jurisdiction is administrative, and not judicial. It is therefore believed by the appellant that the old maxim: "Equity jurisdiction having once attached, continues always" does not apply. In order that the appellee's contention may be sustained, the Supreme court must hold that, having once had jurisdiction of the administration of the affairs of the drainage district, because of the fact that the drainage district was created by the court, jurisdiction to administer its affairs must continue forever, or the supreme court must find that, in the act creating Humphreys county, the legislature relegated the control of this district to the chancery court of Yazoo county, though removing all of the territory included therein from the confines of the county.

We may dispose of the first proposition here, interpreting the law to mean that, because of the organization of the district by the chancery court of Yazoo county, eternal jurisdiction was intended to the chancery court of Yazoo county. We would find the chancery court of Yazoo county administering the affairs of the Straight Bayou Drainage District forever, we would find the chancery court having jurisdiction of the matter because

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of the fact that its *situs* was in what was originally Yazoo county territory when now the *situs* is no longer in Yazoo county, and no longer under the territorial jurisdiction of the chancery court of Yazoo county. This would breach the functional cannons of chancery jurisdiction, where control of land matters belonged to the court, because of the *situs* of the territory involved within the territorial jurisdiction of that court. If the Straight Bayou Drainage District had been a single county district, wholly situated within the bounds of Yazoo county, prior to the creation of Humphreys county, and wholly situated within the newly created boundaries of Humphreys county, under the theory that jurisdiction remains with the administrative board, be it chancellor or board of supervisors, creating it, then we would have the anomalous situation of the board of supervisors of Yazoo county perpetually administering the affairs of a drainage district wholly situated without the boundaries of the county. This could not have been the intent of the legislature in providing for the creation of the drainage district, under the drainage acts above referred to, where such administrative official had jurisdiction because of the territorial situation of the district.

Separate road districts are also *quasi*-corporations of much the same *status,* legally, as drainage districts. Their control and management was specifically provided for in the creation of Humphreys county, and the appellant cannot but believe that drainage districts were not specially provided for because of an unintentional legislative oversight. The act creating Stone county, where no drainage district existed, was copied almost *verbatim* by the legislature, in creating Humphreys, and it is believed that drainage districts were passed over by this means. If the chancery court of Yazoo county could have jurisdiction of a drainage district not within its boundaries, or the board of supervisors of Yazoo

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county have control over drainage districts not within its boundaries, then how could the interest of the taxpayers and landowners of the district be adequately protected. It was the legislative intent that officers responsible to these taxpayers and landowners should have the control of the administration of the districts' affairs.

Is the Administration and Supervision of the Drainage District a Pending Suit?

The appellant feeling that the chancery court in a bi-county district, or the supervisor in a single county district, could not have jurisdiction of the administration and supervision of the affairs of a drainage district, solely because of the fact that the original creation of the district was consummated by either of these official bodies acting in its administrative capacity, feels that the only alternative left, whereby the supervision of the affairs of the drainage district in the instant case may be maintained by the chancery court of Yazoo county, is under the theory that this administration is a civil suit now pending in the chancery court of Yazoo county. It is provided by chapter 248, section 13, of the Laws of 1918, creating Humphreys county, "That all suits, both civil and criminal, now pending in the circuit and chancery courts of Washington, Humphreys, Yazoo, Sharkey and Sunflower counties shall remain and be finally determined in the said courts. The appellant submits that the administration and supervision of the affairs of this drainage district cannot be a civil suit. We have no objection to any definition of "suit," as broadly as its meaning has been construed, which can be presented. The mere administration of affairs constitutes no suit. The very minute that a contest arises, then a suit does exist. If, at the time of the creation of the Straight Bayou Drainage District, its organization had been contested before the chancellor, and appeal taken to the su-

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preme court, under the provisions of the drainage act above referred to, then surely this contest of the organization would be a suit, and, if Humphreys county had been created while this contest was pending, certainly under the section of the Humphreys county act above cited, the creation of this district would still be a matter for decision by the chancery court of Yazoo county, and the chancery court of Yazoo county would retain jurisdiction for that purpose, but the Straight Bayou Drainage District had been created long before Humphreys county was created. It was in process of operation, and the chancery court of Yazoo county was administering and supervising its affairs, as an administrative body, just as the board of supervisors of Yazoo county would have administered and supervised its affairs had the district been situated solely within the boundaries of Yazoo county, at the time of its creation. At the time Humphreys county was created, there was then no suit. Immediately on the contest of the assessment of betterments by the appellant in this case, a suit arose out of the administration proceedings, but this suit is not a part of the administration proceedings, and this suit, arising subsequently to the creation of Humphreys county is not embraced by the terms of section 13 of chapter 348 of the Laws of 1918, because it is not a suit "now pending"—that is, now pending at the time of the creation of Humphreys county.

LOGICAL RESULT.

It is the appellant's contention that the chancery court of Yazoo county holds no continued jurisdiction after the creation of Humphreys county, because of the simple fact that the district was created by the order of the Yazoo county chancery court, and that the administration and supervision of the affairs of the district,

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under the drainage acts above set forth, is not a pending suit within the meaning of section 13, chapter 348, of the Laws of 1908. Therefore either the Straight Bayou Drainage District must die because of Humphreys county, or there must be somewhere implied, within the law creating Humphreys county, steps into the administrative functions once held by the chancery court of Yazoo county.

Whatever the result may be, the appellant cares only to see the matters of the drainage district administered and supervised by a legally constituted administrative board and would rather that the district die, than that it be administered and supervised in an illegal manner.

Comment on Authorities.

The appellant has been unable to find any cases directly involving the question here in litigation, nor has the appellee, it seems from the cases cited in support of its contention. The cases cited by the appellee, *Bass* v. *Elliott,* 105 Ind. 518, 5 N. E., 663; *Croom* v. *Wilson,* 104 Ind. 583,—N. E. 165; *Hockemeyer* v. *Thompson,* 150 Ind. 176, 48 N. E. 1029, 49 N. E. 1059; *State of Missouri ex rel. Otto Kachtitsky* v. *Riley,* 203 Mo. 175, 101 S. W., 567, all are suits, because contest was filed, and exceptions made to finding of the administrative board, when appeal was taken to the courts in manner provided by statute in each case and therefore are not authority for the position that administrative proceedings are a suit but are authority for the contention of the appellant that, wherever litigation arises from a contest of a ruling of an administrative board controlling and supervision drainage districts, such contest then becomes a suit, or a civil suit. In other words if the drainage district had been in process of creation and its organization had been contested, at the time of the

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creation of Humphreys county and contest was made before that time, then, in either case, the cases above cited would be authority supporting the jurisdiction of the chancery court of Yazoo county to hold these litigated contests as suits, and finally determine them, but, in no case are they authority for the perpetual holding of an administrative matter not within the territorial jurisdiction of the official body supposed to administer and supervise.

This distinction is clearly drawn in the Vermont case of *Dunn* v. *Town of Powhal,* cited in the brief of the apellee. *Upshur Co.* v. *Rich,* 135 U. S. 467, respectfully submitted.

Barbour & Henry and *Barnett & Perrin,* for appellees.

The position is taken in the brief for appellant that the administration of the affairs of the appellee district is not a pending suit, but purely an administrative matter, placed in the hands of the chancery court. It is contended ingeniously by counsel that such administration is not a suit, but only an administrative matter, such as is usually exercised by boards of appraisers, etc., and that, as the legislature, in the act creating Humphreys county did not provide for the transfer of the cause then the anomalous situation must exist that everything that has been done in the creation of this and other drainage districts similarly situated, is of no effect, and that the district, by legislative blunder, dies.

The counsel take the position that, as there is no longer any of the territory of the Straight Bayou Drainage District in Yazoo county, the jurisdiction of the chancery court of Yazoo county to administer the affairs of the district to the extent and in the manner provided by law has ceased, notwithstanding it was through that court, as provided by law, that the district was created organized, and its affairs administered,

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up to and since the time of the creation of Humphreys county in which county and the county of Sharkey, the territory of said district is now situated.

While urging this, counsel admit that, if the chancery court no longer has jurisdiction, there exists no court or body anywhere that is vested with this power and jurisdiction given by the drainage district act, and which can perform these necessary functions, and, therefore, the district ceases to exist, and everything done is of no effect, but rather that the district has become dormant until some legislative action is taken. Such a result was never contemplated by the legislature, and should not be reached by the court, if it can be avoided. When created and organized, the district became, as counsel in their brief argue a body, corporate, a legal entity, possessing the powers and subject to the duties conferred and imposed by law. While this territory was at the time of its creation, in Yazoo and Sharkey counties it was not subordinate to these counties, nor is it now subordinate to the counties of Humphreys and Sharkey. Its legal existence and entity is distinct from and independent of these counties, and, in this respect, materially differs from road districts, which must remain under the control of the authorities of the county in which they are located.

This is for the very manifest reason that, under the constitution, the board of supervisors of each county is given exclusive control and jurisdiction over the matter of roads, ferries, and bridges, and the matter of the creation or control of drainage districts is by the constitution vested in no court or body. Drainage districts are created by statute, and are the creatures strictly of statute and the only constitutional restriction is that they must be created by general, and not local, laws. This is not true of road districts, for the reason just stated. The legislature had the power to provide for the creation, organization and administra-

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tion of the affairs of drainage districts, by placing the necessary authority for these purposes in any court or body it saw fit. As a matter not obligatory upon the legislature, but of convenience and expediency, the law provides that the creation and organization of a drainage district whose territory is confined to one county shall be accomplished through the instrumentality of the board of supervisors of such county, but where the territory is situated in more than one county, the chancery court of any county in which any part of the land is situated is to be the instrument. The particular court is a matter to suit the convenience and plasure of the petitioners.

The legislature having vested the power in the chancery court, could as easily have put it in any other body, or in any other tribunal. Since, however, it saw fit to fix the tribunal in which the district could be created and its affairs administered, necessarily that power remains in that court or tribunal until the same power which vested it there, to-wit, the legislature, sees fit to take from it the power so given. If the creation of Humphreys county where intentional or by oversight, as counsel argue, the legislature failed to take from the chancery court of Yazoo county a power which it had previously given it. Therefore, the power remains.

Jurisdiction having thus been properly vested in the chancery court of Yazoo county, we submit that it must there remain, until, by legislative act, it is vested elsewhere, and this has not been done.

The act creating Humphreys county does not, in express terms, nor by implication, divest the chancery court of Yazoo county of its jurisdiction, and it is therefore a necessary assumption that the legislature intended that the jurisdiction of the chancery court of Yazoo county should remain.

The fact that no part of the territory of the drainage district is now in Yazoo county does not, by itself divest

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jurisdiction. Of necessity this could not be so, for the jurisdiction is not made dependent for its existence upon this. All that the law required to confer jurisdiction was that, at the time of the creation of the district, a part of the territory should be in Yazoo county. There is nothing in the law creating this district that divests the court of jurisdiction because of the exclusion of the territory from the county, and any argument on this line is one solely of expendience and convenience, and should be addressed to the legislature, and not the courts. If any hardship may result by reason of the continued administration of the affairs of the district by the chancery court of Yazoo county, rather than the chancery court either of Sharkey county or Humphreys county, it is a matter which the legislature, by an enactment, can easily remedy. In fact, it is no argument whatever to say that it is convenient or expedient that the affairs of the district should be further administered in the chancery court of Yazoo county, rather than in one of the other counties.

Counsel in their brief argue that, if this district originally had comprised territory in Yazoo county alone, and which territory, by the creation of Humphreys county, had passed to Humphreys county alone, an anomalous situation would have existed. It is not our contention to suggest seeming anomalies that do not exist.

Sykes, J., delivered the opinion of the court.

The Straight Bayou drainage district was established in 1916 by decree of the chancery court of Yazoo county, under chapter 269, Laws of 1914 (Hemingway's Code, section 4434, et seq.). The land comprised in this drainage district at that time was situated in the counties of Yazoo and Sharkey. There was no appeal from the order of the chancellor establishing the district as

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provided in section 3 of this act, and commissioners were duly appointed according to the provisions of the act. Humphreys county was created in 1918 by an act of the legislature. The land in this drainage district which had previously been situated in Yazoo county was all given to Humphreys county under this act. The land in this drainage district is now in the counties of Humphreys and Sharkey. Subsequent to the creation of Humphreys county and in 1919, the commissioners of this drainage district in due form gave notice that an assessment of betterments would be made. Such assessment was duly made by the commissioners and a report thereof made to the chancery court of Yazoo county. Notice was given as provided by the act to landowners that objections could be made and would be heard by the chancellor on a certain day. On that day there were no objections filed, and the chancellor affirmed and approved this assessment, from which judgment the appellant prosecuted this appeal.

The sole question presented to this court for decision is whether or not the chancery court of Yazoo county has jurisdiction to administer and supervise the affairs of this drainage district now, since no part of the district is now in Yazoo county. Under chapter 348, Laws of 1918, creating Humphreys county, there is no provision relating to drainage districts previously organized. Section 13 of this act provides:

"That all suits, both civil and criminal, now pending in the circuit and chancery courts of Washington Holmes, Yazoo, Sharkey and Sunflower counties shall remain and be finally determined in said courts."

The general scheme of chapter 269, Laws of 1914, makes the proceeding for the establishment and administration of the drainage district a judicial proceeding. Section 1 of this act provides for the giving of notice looking to the organization of the district and to hearing objections, and the court, or the board of super-

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visors, has to determine the sufficiency of the petition and pass upon the objection, etc. Section 3 provides that the order of the board of supervisors (or the chancellor or chancery court) establishing said district shall have all the force of a judgment and gives the right to appeal. Under this section the organization of the district by the chancery court of Yazoo county was a judicial act. In a broad sense of the word it was a "pending suit" in this court at the time of the decree organizing the district. After its organization, however, under this act there are many other things to be done, namely, the appointment of commissioners, the plan of the drainage district, the improvements to be made, and the assessment of betterments. Commissioners are appointed who attend to the administrative duties, who make reports to the chancery court, and there contests can be had and judicially determined. These contests are judicial questions and part of the general scheme and plan of administering the affairs of the drainage district.

At the time of the creation of Humphreys county, it is true there was no litigated question then pending before the chancellor in this matter for decision. The reports, however, of the commissioners and the assessments for betterments, had not been made. We think in its broad sense that this was a pending civil suit under section 13 of the act creating Humphreys county, and therefore that the chancery court of Yazoo county has jurisdiction of the affairs of this drainage district. One of the definitions of a "suit" in law in 37 Cyc. pp. 522 and 523, is, "A proceeding in a court of justice for the enforcement of a right." Another, "any legal proceeding of a civil kind; an action of any kind in a court of justice, whether commenced by writ, bill, or petition." In defining what is a "suit" Chief Justice Marshall, in the case of *Weston* v. *City of Charleston*, 2 Pet. 449, 7 L. Ed. 481, said:

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"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceding by which the decision of the court is sought is a suit."

The distinction between a mere proceeding administrative in its character, and a suit, is thus defined in the opinion in the case of *Upshur County* v. *Rich,* 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196:

"The principle to be deduced from these cases is that a proceding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit; but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

In the establishment of this district there were parties litigant with the right to contest the formation of the district. The chancery court as a judicial act passed upon the legality, regularity, and sufficiency of the proceedings establishing the district. Whether or not there was an actual contest over the formation of the district is not shown by the record and would in point of fact make no difference, as his decree establishing the district was a judicial act. The laws under which the district was formed expressly provide for the con-

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tinued jurisdiction of the court to pass upon the questions presented to it during the life of the district. It continues to be a pending suit.

A case very much in point is that of *State ex rel.* v. *Riley,* 203 Mo. 175, 101 S. W. 567, L. R. A. (N. S.) 900, which holds that the proceeding in the formation of a drainage district pending in a circuit court under the laws of the state of Missouri is a civil suit.

There may arise during the existence of the drainage district many different questions for adjudication, but all of the proceedings form a pending suit.

There is another reason, however, why the decree of the lower court must be affirmed, and that is this: Chapter 269, Laws of 1914, confers jurisdiction upon the chancery court where the land is comprised in more than one county. By this act the chancery court is empowered to continue this jurisdiction during the life of the drainage district. There is no provision whatever in the act transferring the jurisdiction to any other court under any conditions. There is nothing in the act prescribing any manner in which the court may lose this jurisdiction once acquired. The question is purely a statutory one, and the legislature has conferred this power in this case upon the chancery court of Yazoo county, and this court will continue to have jurisdiction of the affairs of this drainage district, unless the Legislature sees fit to deprive it of this jurisdiction.

The decree of the lower court is affirmed.

Affirmed.

Ethridge, J. (dissenting).

In my opinion the beginning of this controversy was the filing of the assessment roll assessing the benefits, and, as that was filed after the passage of the law creating Humphreys county, the proceeding should have

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been filed in that county. Section 13 of the act creating Humphreys county provides:

"That all suits, both civil and criminal, now pending in the circuit and chancery courts of Washington, Holmes, Yazoo, Sharkey and Sunflower counties, shall remain and be finally determined in said courts."

Inasmuch as the assessment roll of benefits was not filed until long after the approval of this act, this suit cannot be said to be a pending suit unless it was a part of a suit pending prior to that time in the chancery court of Yazoo county, and unless the creation of the drainage district under chapter 195, Laws of 1912, as amended by chapter 269 of the Laws of 1914, was a judicial proceeding, and was undetermined prior to the creation of Humphreys county. Laws of 1914, chapter 269, section 1, provides for the creation of drainage districts, and that on the petition of the owners of real property, describing the territory to be created into a district, the board of supervisors, or the chancery court in cases pending there, shall publish notice in a newspaper having circulation in the proposed district of the intention to organize a drainage district and appoint a day to hear objections, if any are offered; and unless at the hearing a majority of the landowners, owning a majority of the land proposed to be included in the proposed district, shall object to the organization, the district would be created as therein provided, but if such majority shall protest that such board or such court shall determine whether it shall proceed with the organization, and maps out a program of procedure, unnecessary to set out in this opinion, and upon the filing of the report that the clerk shall give notice by publication calling upon the persons interested to appear on the date to be fixed, not earlier than twenty days nor later than forty days after the first publication, to show cause for or against the establishment of said district, and further provides for a hearing by

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the board, or by the chancery court in cases before it, by which the question will be determined. By section 3, chapter 269, Laws of 1914, it is provided that such order of the board or chancellor shall have all the force of a judgment, and that any owner of real property within the district may appeal from said judgment to the chancery court, or chancellor in vacation, if from a decision of the board of supervisors, or to the supreme court if from a finding of the chancery court or chancellor, within twenty days after such order has been made; but, if no appeal is taken within that time, such judgment shall be deemed conclusive and binding upon all real property within the district and upon the owners thereof; and that any owner of property in the district proposed to be organized may within a like time, and in a like manner, appeal from an order refusing to establish such district.

There was no appeal within twenty days as provided therein, and, if the matter was a judicial one at all, it was final under the very terms of the act long before the creation of Humphreys county and ceased to be a pending suit. In my opinion, however, this proceeding is not a judicial proceeding, but is a proceeding of a legislative and administrative nature, and the legislature could have created the district itself without the intervention of any other agency whatever. The legislature may not change the nature of a legislative function by imposing upon a board or other agency powers and discretions which the legislature itself may have exercised without the intervention of such proceedings or board.

The creation of the drainage district is analogous to the creation of a municipality, or any other taxing district. It is legislative in its very nature, and not be judicial. It is true the legislature may enact a law to come into force in certain territory upon conditions, and may create an administrative board to determine

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the facts upon which said law may come into force in such territory; but doing so does not make the determination of these facts a judicial function. The legislative department may determine the facts for itself, or it may intrust that function to another body; but doing so does not make such body a judicial body, nor its proceedings a judicial proceeding. The executive department in the exercise of its functions frequently has to determine facts, but such a determination of facts by the executive is not the exercise of a judicial function.

In *Railroad* v. *Dodd*, 105 Miss. 23, et seq., 61 So. 743, 49 L. R. A. (N. S.) 565, it was held that proceedings before the railroad commission were not judicial functions from which an appeal could be granted to this court, and that chapter 86, Laws of 1908, granting an appeal, was invalid. For additional authorities, see the opinion in that case and the briefs of counsel.

Section 7, chapter 269, Laws of 1914, provides for the assessment of benefit to accrue to the land of landowners in such district, and provides for the filing of such assessment and the giving of notice by publication, and that parties aggrieved may have a hearing, and that such board shall "enter its findings thereon, either confirming such assessment, or increasing, or diminishing the same;" and its finding, whether protest is filed or not, shall be final and have the force and effect of a judgment from which an appeal may be taken within twenty days, and that such assessment "shall stand as a final assessment of benefits upon the lands of the said district, . . . unless in the opinion of the commissioners it becomes necessary to raise the assessment of benefits to such lands because of additional benefits to the lands other than those assessed, or because it becomes absolutely necessary in order to raise funds to preserve and maintain the improvements of the district." Clearly, the proceeding for assessment of the benefits is a suit en-

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tirely separable from and independent of the original order creating the district and the filing of the assessment roll, and the giving notice thereunder is the beginning of the suit, as this and all proceedings subsequent to it was admittedly made and instituted subsequent to the approval of the act creating Humphreys county, and it should have been instituted in the chancery court of Humphreys county, or that of Sharkey county. Other sections of the act creating Humphreys county provide for transcripts of records from the old counties to the new county so far as they affect titles or property in Humphreys county.

In the present case, the chancery court has undertaken to exercise jurisdiction over territory situated beyond the confines of its district. Section 261, Hemingway's Code (section 505, Code of 1906), provides:

A chancellor shall be appointed for and from each of said districts. He may hold terms of court in any other district with the consent of the chancellor thereof when in their opinion the public interest may require."

Under this section he is to be appointed "for" and "from" each of said districts, and it is provided that he may hold terms of court in any other district "with the consent" of the chancellor thereof "when in their opinion the public interest may require." In all other cases his functions are limited to his own district, and it was clearly unlawful for him to exercise judicial powers affecting the citizens and property of people entirely beyond the confines of his district.

DARBY v. STATE.

[In Banc. No. 21137.]

1. CRIMINAL LAW. *Use in argument as substantive proof of impeaching hearsay testimony was error.*

It was error to permit prosecuting counsel in argument to use as

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substantive proof the impeaching or discrediting testimony of a rebutting witness as to a material statement made out of court, in the absence of the accused, by another witness; such testimony, being hearsay, was admissible only for the purpose of impeachment of the credibility of the witness.

2. CRIMINAL LAW. *Witnesses. Contradiction of statement out of court proper; timeliness of objection to improper argument.*

Testimony contradicting a material statement made out of court by defendant's witness was admissible to impeach his credibility, and need not be objected to when offered, but objection and exception to its wrongful use in argument was timely when made during the argument; and, objection to its wrongful use is not waived because it was not objected to when offered, or for failure to request an instruction as to its use and purpose.

3. CRIMINAL LAW. *Improper prejudicial argument reversible error.*

Where it clearly appears that improper argument in the trial substantially prejudiced the rights of the other party, reversal for such error will follow.

APPEAL from circuit court of Tate county.

HON. E. D. DINKINS, Judge.

P. W. Darby was convicted of murder, and he appeals. Reversed, and a new trial granted.

J. F. Dean, for appellant.

We do not think it can be successfully contended that it is not a close question on the facts as shown in this record. Then there was fatal error in the argument of both the county attorney and the district attorney, in arguing to the jury testimony admitted only and admissible only to contradict the witness Ed Darby as direct evidence against appellant. In arguing to the jury whether the appellant was guilty of murder or manslaughter, each attorney for the state used the statement made by Ed. Baker as to what Ed. Darby had told him about the difficulty as a fact proven against defendant; that it was not in self defense or heat of passion, but that appellant had not only shot deceased when he was unarmed, as shown by state's witnesses, but even according to his own evidence that Wade had drop-

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ped his knife into his pocket after he was first shot and that appellant tried vainly to shoot deceased when he knew he was unarmed and had his knife in his pocket and that the only reason he did not do it was that his pistol hung, and cited what Ed Baker said Ed Darby, the brother of the appellant, told him that afternoon as proof on which to base the argument; "Darby denied it, but which are you going to believe, Darby, the brother of defendant, or Ed. Baker who has no interest in this case?" This court will know that it was a physical impossibility to get all the argument of either of the state's attorneys. The special bill of exceptions present but a hint of what was really said but from them, the court can see that every decision of this court upon this point was totally disregarded and fatal error was again deliberately committed over the most urgent protests of defendant's attorney. See *Hill* v. *State,* 118 Miss. 70; *Allen* v. *State,* 66 Miss. 358; *Middleton* v. *State,* 80 Miss. 393; *Williams* v. *State,* 73 Miss. 820.

F. H. Loterhos, Assistant Attorney-General, for the state.

It is respectfully suggested to the court that no error can be found in the failure of the trial court to sustain the objection of the defendant to the argument of the attorneys for the state, as set forth in the special bill of exceptions, pages 80 and 81; because when the witness for the defendant Ed Darby, was asked as to what he was alleged to have said to one Baker, defendant made no objection to the question; and thereafter, upon Baker being asked what the witness had said to him, defendant made no objection to the answer of the witness, Baker, setting forth what he claimed the witness had said to him.

So the record shows no objection or exception to any of this evidence; nor does it show a motion to strike any of the same. For reasons best known to himself, the

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defendant did not see fit to demur to this line of inquiry; and when the evidence went in, apparently, with his consent under our system of trying cases, it was possible that it might be used to his advantage or disadvantage. He cannot be heard to say at a later stage of the proceedings, when reference is made to the evidence, that it is no part of the case. There is a time to object, and there is a time to move to strike from the record; and when these times have passed, evidence that has been previously taken is as much a part of the record as is any other item of evidence. This court has given recognition to the rule that a witness cannot be contradicted upon an answer made by him in cross examination, to a question about a matter collateral or immaterial to the issue; but has never found error in a case where the rule was violated without objection on the part of the one complaining of the violation. Said CAMPBELL, C. J., in *Mabry* v. *State*, 14 So. at page 267:

"All the testimony of what Rials said or did as to the selling or disposing of his gun was incompetent. The testimony of the woman Seitzler, about the night occurrence at White's ought not to have been admitted as evidence; but the record does not show any objection to it when offered and given, and it was too late to raise an objection by motion to exclude, after having experimented with it in the way shown."

In condemning the use of evidence contradictory of the witness on cross examination in a case somewhat similar to this, the court predicated its conclusions upon the following: "Objections and exceptions were made to this rebuttal testimony."

In *Middleton* v. *State*, 31 So. 809, where evidence of this character was condemned, the court was careful, in expressing its view, to state that the question propounded to the defendant's witness as a basis for the contradiction, was permitted over objection and exception, and that the prosecuting counsel was in due course permitted over the objection and exceptions of the de-

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fendant, to contradict the statement. And it does the same in deciding the case of *Williams* v. *State,* 73 Miss. 820, where the opinion reads: "The defendant objected to both the question to Margaret Kelly and the question to John Jeems, and, the objections being overruled, duly excepted."

In *Allen* v. *State,* 66 Miss. 388, the court recognized the same rule, but affirmed, notwithstanding in view of the fact that from the evidence of the appellant, his guilt appeared. It is not unreasonable to assume that in that case, too, objection and exception to the ruling of the court were made and taken.

In as vital a situation as that of the absence of the defendant from part of his trial in the circuit court this court has said that objection must be made as a preliminary to relief here. See *Poole* v. *State,* 83 So. 273. The court says: "If he fails to object and accepts his chance of a favorable jury verdict he cannot afterwards complain."

Hence, it would seem that this appellant cannot, here and now, be permitted to successfully maintain that the effect of evidence which went into the record, without his objection, was erroneously damaging to his cause.

HOLDEN, J., delivered the opinion of the court.

This is an appeal by P. W. Darby, who was convicted of the murder of D. O. Wade in Tate county.

On the morning of the killing the deceased, Wade, went to the home of the appellant, and there had a controversy with him regarding a debt, the deceased using some rough language toward appellant and threatening him with violence, whereupon the appellant left the presence of the deceased. Subsequently on the same day the appellant went to Savage, a village about ten miles away, and when he got there, the deceased, Wade, who was already there, again approached him with reference to the matter discussed previously at the home

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of appellant. The appellant again declined to discuss the matter or be drawn into a difficulty with the deceased, whereupon the deceased again threatened appellant, and when appellant turned to walk away the deceased struck him a vicious blow from behind, either with his fist or with something clenched in his hand, hitting the appellant on the back of the head, almost knocking him down, and as he staggered forward a few steps he drew his pistol, recovered his balance, whirled and fired upon the deceased, killing him. Up to this point there seems to be no substantial dispute in the testimony. There is a conflict in the proof as to what the deceased was doing and whether he had a knife drawn in his hand at the time the fatal shot was fired. There is also conflict in the evidence as to the actions of the appellant immediately after firing the shot. However, we are not concerned with the conflicting testimony, as this phase of the case was a question of facts to be settled by the jury.

There are two serious questions presented by this appeal, one of which is whether the evidence taken as a whole warranted the jury in finding the defendant guilty of more than manslaughter; and the other is whether the lower court erred in permitting the prosecuting attorneys in their arguments to the jury to comment upon certain proof made by the state in the case, which we will presently set out. We shall omit passing upon the first question presented because a decision of the second will reverse the judgment, and the first question may never arise again.

Ed. Darby, a brother of the appellant, while on the stand testified that he was present and witnessed the shooting. He said that the appellant fired one shot and dropped his pistol to his side, and made no further effort to shoot the deceased. On cross-examination by the state this witness was asked if he had not stated to one Ed. Baker the same evening that the appellant would

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have continued to shoot the deceased, but he could not work his gun the second time, and that—

"If the gun had not hung, I believe he would have killed me and him both. I never saw a man trying to shoot any harder. Pete was so mad he didn't really know what he was doing."

The witness, who, as we have said, was a brother of appellant, denied making any such statement to Ed Baker. The state then introduced the said Ed Baker, who contradicted the witness Darby by his testimony as follows:

"Ed Darby said, 'If the gun had not hung, I believe he would have killed me and him both. I never saw a man trying to shoot any harder.' 'Pete was so mad he didn't really know what he was doing.' "

This testimony of Baker was not objected to by the defendant.

During the argument to the jury the county prosecuting attorney said:

"The evidence in this case shows that P. W. Darby shot Wade when Wade was doing nothing, and that he would have shot him again if his gun had not hung; why do I say that? Ed Darby, the man who was there, who had hold of Wade's arm, told Ed Baker so that afternoon."

The defendant then and there objected to this argument by the state's attorney, to which objection the court replied. "The jury heard the evidence." And thereupon the prosecuting attorney repeated and emphasized the same argument to the jury, to all of which the appellant then and there excepted. In the concluding argument of the district attorney he stated to the jury:

"The evidence showed that defendant shot deceased once, and would have shot again, but his pistol hung fire. Ed Darby said on the stand that it did not, but that day when it was fresh in his mind he told Ed

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Baker, a man who had no interest in this case, that Pete would have shot again, and that he might have been shot himself if the pistol had not hung fire. Which will you believe, Ed Darby, the brother, or Ed Baker, who had no interest in this case? I say that Ed Baker told the truth."

The defendant objected to this argument, and thereupon the prosecuting attorney retorted, "If Baker did not say that, I heard nothing right." The court refused to instruct the jury to disregard the argument and said, "The jury understands." The defendant then and there objected and excepted to the argument and the ruling of the court.

It is contended by the appellant that it was error to permit counsel for the state in their argument to use the impeaching or discrediting testimony of the witness Ed Baker as substantive or direct proof, when in fact it was hearsay testimony, and could be used for no purpose except to impeach the credibility of the witness Ed Darby.

The state replies to this contention by saying that the testimony contradicting the witness Darby by Baker was not objected to at the time by the defendant, and since it was admitted without objection it was legitimate for use for all purposes.

We must disagree with the contention of the state in this regard for two reasons First. The contradicting testimony was competent and admissible for the purpose of impeaching the credibility of the testimony of the witness Darby, as the matter about which the witness Darby was contradicted was relevant and material, in that it tended to prove the actions of the appellant immediately after shooting the deceased, and was pertinent in determining the close question of murder or manslaughter. Therefore an objection to this testimony by the defendant would have been unavailing. Second. The objection made by the defendant to the use of this

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testimony in argument by the prosecuting attorneys as substantive proof, instead of mere impeachment of credibility, was timely, we think, because it had not before become necessary or proper to object, nor could the defendant anticipate that the state's attorney would use the testimony in his argument for any other purpose than to show the impeachment of the credibility of Darby. The defendant had not waived his right to object but objected as soon as the state's representatives attempted to use this hearsay testimony wrongfully in the argument.

We feel quite certain that the argument complained of was peculiarly damaging to the interests of the accused, and probably influenced the jury to a conviction of murder. The correctness of this conclusion seems more apparent when it is remembered that the whole proof in this case leaves it debatable, if not doubtful, as to whether or not the appellant should have been convicted of more than manslaughter.

In the case of *Hill* v. *State,* 118 Miss. 170, 79 So. 98, this court reversed the judgment of the lower court upon the same ground presented here. There is practically no difference between the question in the Hill Case and the one at bar, except in that case the court refused an instruction telling the jury that such hearsay testimony could only be used as going to the credibility of the witness sought to be impeached. In the case before us no written instruction was asked, but we do not believe the failure on the part of the defendant to ask for such an instruction should preclude him from raising the objection at the time the prosecuting attorney attempted to wrongfully use the hearsay evidence in his argument to the jury. The fact that the defendant did not ask for such an instruction should not be held as a waiver of his right to object to the unwarranted argument of the district attorney at any time during the trial, which he could not anticipate. It is to be fairly

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assumed that the officer occupying the high office of public prosecutor will not use any testimony in the case for a wrongful purpose in his argument to the jury. Relying upon this assumption, the accused was certainly within his rights in making the objection to the wrongful and damaging argument of the prosecutor at the time it was made.

This court, following its previous rulings has often refused to reverse on account of improper arguments of counsel which we disapproved; the ruling being based upon the ground that before reversing for improper arguments it must clearly appear that the party was substantially prejudiced by such argument. But we have no doubt in the case now before us that the improper argument by the prosecuting attorneys was exceedingly damaging, and substantially prejudiced the rights of the accused.

In the *Hill Case, supra,* the rule is well stated, and we here quote from the headnotes:

"To discredit a witness by showing that he made a contradictory, material statement out of court is one thing and it justifies argument that he is unworthy of belief; but it is quite another thing, and not justified to predicate an argument for conviction on the unsworn contradictory statement out of court, in defendant's absence, as if it were a substantive fact proved.

"Where in a murder case the district attorney's argument laid stress on what a witness, who was with deceased when he was shot, told other persons, and then treated such hearsay statements as evidence that defendant shot without provocation, such an argument was improper as an appeal to convict on the hearsay testimony of a rebuttal witness."

In view of the conclusions reached above, the judgment of the lower court will be reversed, and a new trial granted.

Reversed and remanded.

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BOYD *et al. v.* APPLEWHITE *et al.*

[In Banc No. 20630.]

1. BANKS AND BANKING. *Directors and majority stockholders permitting excessive loans to directors are liable to minority stockholders for loss of their stock.*

The directors of a bank who own a majority of the capital stock and who permit improvident and excessive loans to be made by the bank's officers to the individual directors themselves, causing the bank to become insolvent and go into the hands of a receiver and the capital stock to become worthless, are liable in damages to the minority stockholders for the loss of their stock.

2. BANKS AND BANKING. *Directors not examining books and securities to determine bank's condition do not exercise ordinary care.*

The directors of a bank who never make or cause to be made an examination of the books and securities of the bank to determine its condition and the way it is being conducted do not exercise ordinary care and prudence in the management of the bank's affairs.

3. BANKS AND BANKING. *Directors whose negligent supervision renders minority stock valueless cannot plead ignorance.*

Directors of a bank who negligently fail to exercise reasonable control and supervision of the bank's officers cannot, as against the claims of innocent stockholders whose stock has been rendered worthless by such negligence, plead ignorance of that which by proper diligence and inquiry the directors ought to know.

4. BANKS AND BANKING. *Evidence held to sustain chancellor's decree for minority stockholders against directors permitting excessive loans.*

In a suit in equity by stockholders against the directors to recover losses sustained through neglect of duty, misconduct, and negligence of the directors causing the bank to become insolvent and the capital stock valueless, the findings of fact by the chancellor and his decree in complainant's favor cannot be said to be clearly wrong, where there is testimony tending strongly to prove that the paid-in capital stock of the bank was one hundred thousand dollars and that the directors by inattention, by failure to enact by-laws governing the officers, by

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failure to examine the books, papers, and securities of the bank, negligently permitted the president and cashier to lend the individual members of the board of directors the aggregate sum of two hundred and twenty-nine thousand dollars, a part of which is evidenced by large overdrafts, as a result of which the institution was wrecked and the capital stock rendered worthless.

5. JURY. *Statute making negligence and contributory negligence jury questions has no application in equity case.*

Chapter 135. Laws of 1910 (section 503, Hemingway's Code), providing "all questions of negligence and contributory negligence shall be for the jury to determine," has no controling application in an equity case.

6. BANKS AND BANKING. *In suit by minority stockholders against directors for losses resulting from their negligence directors cannot plead invalidity of charter.*

Where it is shown incorporators apply for and obtain a charter incorporating a bank under a law that is valid, issue stock in due course, elect officers and a board of directors, and actually conduct business in the corporate name, the chosen directors, who accept the position and assume to discharge the duties of their office, cannot in a suit in equity against them by minority stockholders plead that because the charter of the bank is invalid they are not directors of a corporation.

7. BANKS AND BANKING. *Liability of directors for negligence is tortious, so that they may be sued jointly or severally.*

The liability of bank directors for negligence in the performance of their duties does not rest upon contract, but is based upon the violation of duty and is in the nature of a tort, and stockholders who are injured by their negligence may sue one or several of the joint participants.

8. LIMITATION OF ACTIONS. *Suit by minority stockholders for loss from directors' negligence is not governed by the three-year statute of limitations.*

A suit in equity by stockholders against the directors of a bank for violation of their duties, as a result of which the bank becomes insolvent and the stock worthless, is a suit based upon negligence and the three-year staute of limitations governing actions based upon contracts, express or implied, has no application.

9. BANKS AND BANKING. *Director sued for loss to stockholders from excessive loans to himself cannot plead that he did not act for the bank.*

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A bank director who applies for and receives loans in excess of the capital stock of the bank, causing the bank's failure, is, in a suit by stockholders against him and the other directors for gross negligence, as a result of which the stock is made worthless, estopped to plead that he did not act for the bank in making such improvident loans to himself.

10. BANKS AND BANKING. *Receiver's written assignment of bank's claims against negligent director construed to preserve minority stockholders' action against such director.*

Where an insolvent bank is placed in the hands of a receiver as a result of the gross negligence of the directors, and the directors execute a writing guaranteeing depositors and stockholders against loss, and the receiver under the approval and by decree of the chancery court executes a written assignment to a purchaser of the notes, securities, and claim of the bank against one particular director, a provision in the written assignment expressly excepting from the operation of the conveyance the director's "individual guaranty to depositors and stockholders" preserves the right of action by stockholders against such negligent director whose indebtedness is thereby assigned for negligence resulting in the loss of the capital stock.

11. BANKS AND BANKING. *Assignment by bank's receiver of its claim against director should be construed with reference to the circumstances.*

The written assignment by a receiver of an insolvent bank of the bills and accounts receivable and the claim of the bank against an individual member of the board of directors in pursuance of a decree authorizing the receiver to sell the bank's said claim should be construed and its scope determined by the circumstances and the purposes to be accomplished.

12. BANKRUPTCY. *Negligent bank director sued by minority stockholders cannot plead discharge in bankruptcy where demands were not reduced to judgment when discharge was granted.*

A discharge in bankruptcy cannot be pleaded in bar to a suit in equity by stockholders against a negligent director for losses occasioned by mismanagement of the bank's affairs, where the demands sued for were unliquidated and had not been reduced to a judgment at the time such discharge was granted.

13. BANKRUPTCY. *Director is "officer" within exception of debts created by fraud or defalcation.*

The director of a banking corporation is an "officer" within the meaning of section 17, subd. 4, of the Bankrupt Act (U. S. Comp. St. section 9601), excepting from discharge debts created

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by fraud, misappropriation, or defalcation of a bankrupt while acting as an officer or in a fiduciary capacity.

14. EXECUTORS AND ADMINISTRATORS. *Unliquidated claim against negligent bank director is not a claim for probate against his estate.*

Stockholder's unliquidated claim for damages against a negligent bank director, who dies pending litigation, is not a claim for probate against the estate of a deceased person under section 2107, Code of 1906 (section 1775, Hemingway's Code).

15. BANKS AND BANKING. *"Cashier" is bank's chief executive officer.*

The "cashier" of a bank is the chief executive officer through whom the whole financial operations of a bank are conducted.

16. BANKS AND BANKING. *Cashier is liable for losses resulting from his tortious acts.*

The cashier of a bank is liable for losses resulting from his illegal, fraudulent, or tortious acts, or from his negligence.

17. BANKS AND BANKING. *Directors' authorization no defense as to cashier's negligence.*

The cashier is responsible for losses suffered directly from his failure to exercise reasonable skill and ordinary care and diligence in the discharge of his official duties. It is no defense that the directors, or any one of them, authorized him to do that which he knew, or ought to have known, was unauthorized or unlawful.

18. BANKS AND BANKING. Cashier making excessive and unauthorized *loans to a director is liable for resulting losses.*

A cashier who negotiates excessive and improvident loans to a director without authority from a majority of the board of directors is responsible for losses directly occasioned by such negligence.

19. BANKS AND BANKING. *Pledgee of stock may join in suit against directors for negligence.*

A *bona-fide* pledgee of bank stock may join as a party complainant in a stockholders' suit in equity against the directors for negligence resulting in the destruction of the stock.

20. BANKS AND BANKING. *One negligent director may not sue his associate directors for gross negligence.*

One negligent director may not sue his associate directors for gross negligence resulting in the bank's failure and a destruction of the capital stock.

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21. BANKS AND BANKING. *Trustee of negligent bankrupt director cannot join in stockholders' suit against other directors for losses from their negligence.*

A trustee in bankruptcy for one negligent director, who has been adjudicated a bankrupt, should not be permitted to join as a party complainant in a suit by stockholders against the directors for gross negligence resulting in the destruction of the capital stock.

22. BANKS AND BANKING. *Executrix of negligent director cannot sue surviving negligent directors for gross negligence.*

It would be inequitable to permit the executrix of one negligent director to sue the surviving directors for damages as a result of gross negligence attributable to the entire board of directors.

23. APPEAL AND ERROR. *That record did not show decree of revival on death of complainant held not reversible error in view of record on appeal.*

Where, in a suit by stockholders against negligent directors for damages for the loss of capital stock, it is shown that one party complainant died after the cause had been submitted to the chancellor for final determination, that a proper suggestion in writing of the complainant's death is made and a petition filed asking for an administrator *ad litem* to prosecute the suit, and a final decree adjudicates recovery in the name of the administrator, such decree will not be reversed on account of the absence in the record of a decree reviving the cause in the name of the said administrator *ad litem*, especially where the record reserves no exception or objection to the said appointment or to the language of the final decree awarding recovery in the name of the administrator, and no showing whatever made that an administrator *ad litem* was not in fact appointed and the cause revived in his name.

APPEAL from chancery court of Attala county.

HON. A. Y. WOODWARD, Chancellor.

Suit by Carrie S. Applewhite and others against L. Niles Boyd and others. Decree for plaintiffs, and defendants appeal. Affirmed in part, and reversed in part.

Green & Green, R. H. & J. H. Thompson, Fulton Thompson, S. L. Dodd and *O. A. Lucket,* for appellants.

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Teat & Teat and *Boothe & Pepper,* for appellee

STEVENS, J., delivered the opinion of the court.

There is involved in this proceeding the liability of the directors and officers of the C. C. Kelly Banking Company, a corporation, to the minority stockholders for alleged gross negligence in the management of the bank. The suit as now styled is a consolidation of two suits instituted by the stockholders against the said directors and officers. There were demurrers to the bills in both cases, and from decrees overruling the demurrers appellants prosecuted an appeal to this court, and the decrees of the chancery court were affirmed in *Kelly* v. *Applewhite,* 115 Miss. 5, 75 So. 753, and *Kelly* v. *Jones,* 76 So. 280. This court in passing upon the pleadings said:

"The gravamen of the bill is the neglect of duty, misconduct, and negligence of the directors, causing the bank, to become insolvent and having to go into the hands of a receiver, thereby rendering their stock valueless." 75 So. 753.

After the suits had been remanded to the trial court, answers were filed and much testimony taken, and the suit as consolidated was submitted to the chancellor for final hearing upon the pleadings and proof, and a final decree rendered sustaining the bills, finding the directors and officers guilty of negligence, and awarding the complainants damages to the extent of the book value of their stock. From this final decree appellants as defendants in the court below prosecute this appeal and assign and argue many grounds of alleged error. The facts necessary for a proper appreciation of the issues presented may be stated briefly as follows: For many years prior to 1914, the C. C. Kelly Banking Company did a general banking business at Kosciusko. Prior to 1890 the business was conducted by C. C. Kelly as a

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private banker under the name of C. C. Kelly Banking House. In 1890 Mr. Kelly with others made application to the state for a charter incorporating the bank. A charter was approved by the Governor; delivered to the stockholders, and recorded in the office of the secretary of state, and in the chancery clerks office of Attala county; but the charter was not filed with the chancery clerk within one year after the same was approved by the Governor or within one year after the Constitution of 1890 became effective. Whether the charter was valid, and whether the corporation was lawfully organized under it, are disputed questions of fact in the case. It does appear that the C. C. Kelly Banking House changed its name to C. C. Kelly Banking Company, and upon making application for a charter opened books in its corporate name, noted its capital stock at one hundred thousand dollars, purchased and had possession of a stock book, and actually issued stock to the original stockholders. The stock so issued remained in the stock book for some time and was later torn out of the book, together with the stubs. Whether this stock was actually delivered is a disputed question of fact. The company did elect directors and a president and cashier of the banking institution, and these officers assumed to act as such and served as directors and officers. In 1905 there was a reorganization; new shareholders subscribed, and certificates of stock were thereupon issued to all of the stockholders, and since March 6, 1905, the shares of stock have been bought and sold in due course of business. The capital stock remained, at the so-called reorganization, at one hundred thousand dollars, consisting of one thousand shares at the par value of one hundred dollars per share, and from the bank records all this stock has been subscribed for, issued, and fully paid, in money or its equivalent. The board of directors after March, 1905, began to hold periodic meetings, and the minutes of the directors' meetings

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disclose that quarterly meetings provided by statute were held, and from these minutes it would appear that the directors attempted to examine into the securities and condition of the bank at the quarterly metings in compliance with the duty imposed by law. On February 14, 1914, the officers and directors of the bank closed the doors of the institution and applied for the appointment of a receiver, who was appointed, and the assets were thereupon placed in the hands of a receiver under the jurisdiction of the chancery court. The officers and directors who closed the bank and placed the same in the hands of the receiver owned approximately eight hundred shares of the outstanding stock; the remaining shares being owned by the appellees, complainants in this suit. In the course of the liquidation complainants discovered for the first time that the bank was hopelessly insolvent and their stock was worthless. The chancellor found that the defendants "were negligent and had mismanaged the affairs of the bank," and that they "are liable to the stockholders for the book value of the stock, together with six per cent. interest thereon from the date of the failure of the bank until paid."

The record discloses, and the chancellor found, that the active members of the board of directors were G. Lowenberg, a merchant doing a large business in the city of Kosciusko under the firm name of G. Lowenberg & Co., in which mercantile business E. Simon was a partner; J. Niles Boyd, a merchant; N. M. Falk, a cotton broker; and J. N. Alexander, a merchant. It appears that one Walter Burgess was formerly a member of the board, but died several years before the failure of the bank, and that B. L. Clark, another director, had moved to the state of Oklahoma, but there is no record of the resignation of Clark as director; and there was no effort to fill the vacancies caused by the death of Burgess and the removal of Clark. When the receiver took charge, it was ascertained that three of the

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active directors, Lowenberg, Boyd, and Falk, owed the bank the large sum of two hundred and twenty-nine thousand dollars. Of this sum Lowenberg and the firm of Lowenberg & Co. owed one hundred and seventy-three thousand dollars; Boyd, forty-three thousand dollars; and Falk, twelve thousand dollars. The indebtedness due by Boyd and Falk was subsequently paid. The claim of the bank against Lowenberg was, by the approval of the court, sold and assigned by the receiver to one Joseph Ascher for a consideration of fifty thousand dollars cash, thereby leaving a loss on the Lowenberg indebtedness of over one hundred thousand dollars. After the assets had been realized upon, the depositors were paid in full and nothing was left for the minority stockholders.

On December 27, 1913, the directors, as provided by chapters 110 and 111, Laws of 1908, prepared and published a statement showing the condition of the bank at the close of business December 27, 1913, and in this sworn statement the capital stock paid in is given at one hundred thousand dollars, surplus ten thousand dollars, undivided profits fourteen thousand, three hundred and thirty-nine dollars and eighty-six cents, and appended to the statement and as a part thereof is listed the indebtedness due the bank by the officers and directors as follows:

"(1) By the officers of said bank one thousand, five hundred and thirty dollars. (2) By the stockholders and owners of said bank two thousand, one hundred fifty-eight dollars and thirty-eight cents. (3) By the directors of said bank fifty-nine thousand, sixty-four dollars and twenty-four cents. When organized? 1890."

This statement according to the findings of the receiver was in harmony with what the books of the bank purported to show as to its assets and liabilities, except the real indebtedness by Lowenberg, amounting to one hundred seventy-three thousand, four hundred ninety-two

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dollars, and ninety-seven cents, is not included in the amounts purporting to have been loaned the directors, but appears under the general designation of loans, discounts, and overdrafts. Each of the directors who was so largely indebted to the bank had large overdrafts. The receiver's audit of the books further shows that the book value of the stock in February, 1914, when the bank went into the hands of the receiver, was approximately, one hundred twenty-three dollars per share. Appellants do not dispute the fact that excessive loans were made to Gustave Lowenberg and admit that the bank's failure was "attributable to improvident loans of large sums of money made to Gustave Lowenberg." Soon after the bank was placed in the hands of the receiver, Lowenberg went into bankruptcy, and the bankruptcy court took jurisdiction of and administered his assets, and in March, 1914, Lowenberg received his discharge in bankruptcy. Lowenberg's indebtedness to the bank was duly scheduled in the bankruptcy court, and the bank and its receiver appear to have had notice of the bankruptcy proceeding; but any claim of appellees against Lowenberg for damages was not scheduled, and appellees were not listed as creditors. Pending the suits, Lowenberg died, and Clara Lowenberg, executrix of his will, assumed to administer upon his estate, and this suit was revived against her as personal representative of the decedent.

B. L. Clark appears to have served as a director from 1905 until January meeting, 1911, and signed the statements prepared for the board of directors; but there is no record that he was present at any subsequent meeting, or that he had any further active connection with the bank.

It appears that Burgess was a director and participated in the meetings until January, 1912. Director Alexander did not owe the bank anything but, on the contrary, had a deposit in the bank.

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There is evidence tending to prove that before the doors of the bank were closed the directors held a meeting in an effort to avert a crisis. Lowenberg was then pressed for some definite promise or adjustment or his large indebtedness, but responded that he could do nothing. The directors decided that the institution must be closed and voluntarily asked for the appointment of a receiver.

J. M. Knotts, a defendant in the action, was the cashier. The bill of complaint name him as a director and officer, but the record discloses that, while he served for a time as director, he resigned prior to the time it is alleged the losses of the bank accumulated. It is charged in the bill, and the proof tends to show, that the excessive loans to Lowenberg and others began in 1909 and steadily increased until the bank failed. During this period of time Knotts served as the active cashier and C. C. Kelly as president. Directors Boyd, Falk, and Alexander defendant upon the theory that they had no actual knowledge that Lowenberg owed the bank anything like so large a sum, and only ascertained the fact immediately prior to the time the receiver was applied for. Knotts, the cashier, defends largely upon the theory that C. C. Kelly, the president, was the largest stockholder and the dominant influence in the bank and authorized most of the loans; that no by-laws were adopted; and that the cashier put into execution the wishes of and obeyed the orders of the president.

The defendants introduced testimony tending to show that the regular directors' meetings were held after 4 o'clock in the afternoons when the actual notes and securities of the bank were locked into the vault, and that the president would call upon Mr. Lowenberg to read aloud the bills receivable held by the bank, and that Mr. Lowenberg in doing so would omit to read aloud or advise his associates of the large items constituting his individual indebtedness or liability to the bank, and that

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on this account Boyd, Falk, and Alexander were kept in ignorance of this excessive loan. There is further evidence tending to prove that the directors reposed great confidence in the president as also in Mr. Lowenberg.

For the complainants there is evidence tending to prove that the directors did not in fact examine into the securities and true state of affairs of the bank at any of their meetings; that they did not count the cash, or scrutinize carefully the securities held by the bank, but negligently permitted the president and cashier to make large and excessive loans to the directors; and that these excessive loans wrecked the institution and made worthless the complainants' stock.

In the prosecution of this appeal, appellants, Boyd, Alexander, and Falk submit the following points:

(1) That the chancellor erred in refusing to award a jury trial as prayed for.

(2) That the C. C. Kelly Banking Company was not lawfully incorporated, in that: (a) The charter was approved by the Governor contrary to the advice and opinion of the Attorney General; (b) that a copy of said charter was not seasonably recorded as required by the statute and as a consequence thereof the stockholders were liable as partners; (c) that no organization took place and business commenced under the charter within one year after 1890 in compliance with section 180 of the Constitution, providing:

"All such charters under which organization shall not take place in good faith and business be commenced within one year from the adoption of this Constitution, shall thereafter have no validity.'

(3) That negligence has not been sufficiently proven.

(4) That the cause of action is barred by the three-year statute of limitation.

(5) That an alleged guaranty executed by the directors "Exhibit K," is without consideration, and further more is the product of duress, and no liability can be predicated thereon.

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(6) It was error to grant relief to Mrs. Walter Burgess or to Mrs. Fannie Burgess, executrix, or to grant relief to S. P. Rimmer pledgee of the stock issued to and owned by director B. L. Clark, or to grant any relief to W. R. Witherington, trustee in bankruptcy of B. L. Clark ,and lastly that book value is not the measure of damages.

Separate briefs are on file in behalf of Clara Lowenberg, executrix of the estate of Gustave Lowenberg, deceased, arguing the general propositions: First, that Lowenberg could not and did not act for the bank in borrowing the large sums of money from the bank, and is not guilty of negligence in making loans to himself or to any other person. Second, that the bank assigned all claims of the bankrupt to Ascher, and that this conveyance carries whatever interest appellees had in the bank and whatever right appellees had as against the directors. Third, the discharge in bankruptcy released Lowenberg from liability for all provable debts including any liability to appellees. Fourth, that appellees did not probate any claims against the estate of Lowenberg in the state court, and on that account their claim is barred. Fifth, that the cause of action is barred by the three-year statute of limitation.

Mr. Knotts, the cashier, by separate brief, contends that no decree can be entered against him based on negligence for the reasons that the directors were empowered by the charter to enact proper by-laws, that no by-laws were adopted, that the cashier has violated no by-laws or rule of the banking institution, and that his acts generally were consistent with the duties imposed upon him by usage and by the directions of his superior officer, the president.

There is proof tending to show that appellants executed a written agreement referred to above as "Exhibit K," whereby they obligated themselves to pay to the receiver within twelve months such sum as would be

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required to make the entire assets of the bank amount to the sum of two hundred, ninety-three thousand, two hundred dollars and forty-seven cents, and guaranteeing the payment of all depositors in full, and also the book value of the stock held by appellees. This agreement is in the following language:

"State of Mississippi, County of Attala.

"In consideration of a release from liability to the creditors of the defunct C. C. Kelly Banking Company of Kosciusko, Mississippi, which said creditors hold against us, we, the directors, officers and officials of said banking company, agree and do hereby release and relinquish all claims against said banking company which are held by us, and to pay to E. Carr, receiver of said banking company, or any successor thereof, within twelve months from this date, such sum as is required to make the entire assets of said banking company amount to the sum of two hundred ninety-three thousand two hundred dollars and forty-four cents, exclusive of all claims for expenses of the receivership of said banking company; it being our intention and we do hereby agree to guarantee the payment of all of the depositors of said banking company in full, and the following stockholders the book value of the capital stock of said banking company held by them, to wit: Mrs. Fannie L. Burgess, five shares; S. J. Winters, five shares; Mrs. Minnie Orr, ten shares; Mrs. Birdie Dodson, ten shares; Carrie Sue Applewhite, five shares; J. M. Chestnutt, ten shares; W. M. Breazeale, five shares; J. A. Teat, twenty shares; R. A. Clarke, five shares; W. E. Jones, fifteen shars; E. W. Curry, five shares; J. A. Kelly, twenty shares; R. G. McCoy, ten shares; M. C. Hollingsworth, ten shares; W. E. Sanders, five shares. Witness our signatures on this 12th day of March, 1914. (Signed) J. Niles Boyd, N. M. Falk, G. Lowenberg, C. C. Kelly, J. N. Alexander, J. M. Knotts, R. E. Kelly."

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The written assignment executed by the receiver to Joseph Ascher above referred to is as follows:

"For value received from Joseph Ascher, by terms of contract and bond, this day executed, by the terms of which contract, the undersigned has sold, transferred, assigned and set over and delivered to said Ascher all claims of every character and description held against the firm of G. Lowenberg & Company and G. Lowenberg and E. Simon individually, the undersigned, by authority of the chancery court of Attala county, Mississippi, hereby relinquishes all claims of every character and description against said G. Lowenberg & Company and said G. Lowenberg and said E. Simon; the said Joseph Ascher having become the absolute owner of all of such claims heretofore held by the C. C. Kelly Banking Company, and now held by me as receiver of said C. C. Kelly Banking Company; the undersigned having held back and retained no claim of any character or description against either said firm of G. Lowenberg & Company or G. Lowenberg and said E. Simon except his individual guarantee to depositors and stockholders, Ascher having purchased all claims, indebtedness, and securities held by said banking company, and by the undersigned receiver.

"Witness my signature this March 16, 1914.

"[Signed] E. CARR, Receiver."

The facts in reference to any liability of appellants to Mrs. Fannie Burgess, administratrix, and to the trustee in bankruptcy of B. L. Clark, will be subsequently stated in discussing the legal questions involved. So also with reference to the pertinent facts as to the recovery awarded George L. Teat, administrator of L. M. Kelly, deceased.

We shall dispose of the very many points argued by counsel without a discussion of each point separately or in the order in which they are submitted in counsel's briefs. The general contention that there is no liability shown may be disposed of by the application of

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well-known principles of law. On the main question of liability there is abundant testimony to support the findings of fact and the final decree entered by the learned chancellor. There is proof tending to show that, from 1909 until the failure of the bank, appellants were active directors in full charge of the bank; that they owned more than three-fourths of the capital stock; that they assumed to discharge their duties as directors and held quarterly meetings and issued quarterly statements in January, April, July, and October of each year as provided by statute; that at these meetings they assumed to make a personal inspection of the books, accounts, and securities of the bank and rendered sworn statements to the auditor of public accounts as provided by law, and published these statements in a local newspaper at Kosciusko. It is shown that the statements made to the auditor and published to the world did not reflect the true condition of the bank; that the directors did not in fact make a sufficient inspection of the books and securities of the bank, but relied upon the president and cashier; that the president and cashier made excessive and improvident loans; and that these improvident loans rendered the bank insolvent, wrecked the institution, and led to the appointment of a receiver.

At the time the bank failed, G. Lowenberg and the partnership of G. Lowenberg & Co. owed the bank approximately one hundred seventy-three thousand dollars. J. Niles Boyd owed approximately forty thousand dollars individually and some five thousand dollars or six thousand dollars as indorser. Appellant Falk owed twelve thousand dollars by overdraft. The capital stock of the bank was one hundred thousand dollars. The president and cashier permitted the directors to overdraw from time to time and permitted the Lowenberg indebtedness steadily to increase from year to year until it reached a sum in itself sufficiently large to impair the capital and crush the institution.

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The real defense interposed by appellants is their ignorance of the true condition of the bank. Appellants Boyd, Falk, and Alexander especially contend that they did not know that Lowenberg owed the bank any such appalling sum. They attempt to justify their ignorance on the ground that the meetings of the directors were held after banking hours when the time-locked vaults of the bank were closed, and that Mr. Lowenberg misread the discount register and failed to read out the large indebtedness due by him or to advise his associates in reference thereto. It is in evidence, however, that the bills receivable register showed the loans; that this book was actually present at the quarterly meeting; and that appellants made no effort to examine this book carefully, or to examine the other books of the bank, made no inquiry into the true *status* of the Lowenberg indebtedness, whether increasing or decreasing, enacted no by-laws whereby officers would be restrained in making loans and taking securities, and in fact failed to perform the duties imposed by statute as well as by good banking. It appears that appellants were business men engaged in and about their own affairs and were large borrowers from their own institutions.

The directors cannot successfully plead their own ignorance as against the claims of appellees, the innocent stockholders, under the circumstances made by this record. The law of the case is well settled. In *Ellis* v. *Mercantile Co.*, 103 Miss. 560, 60 So. 649, 43 L. R. A. (N. S.) 982. Ann. Cas. 1915B, 526, our court by Judge REED observes:

"The chief contention by appellants is that directors are not liable for losses sustained on account of their negligence in managing the affairs of the bank. The board of directors is the governing body of a bank. As such managing body, they exercise, conduct, and control

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all corporate powers. To the directors is committed the general management of the affairs of the bank."

And in quoting from Thompson on Corporations:

"They are responsible for loss resulting from the wrongful acts or omissions of other directors or agents, where such loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with proper attention or in neglecting to use proper care in the appointment of such agents." *Ellis* v. *Mercantile Co.*, 103 Miss. 560, 60 So. 649, 43 L. R. A. (N. S.), 982, Ann. Cas. 1915B, 526.

The principles of law announced in the Ellis Case are controlling, and in fact the governing authorities in this case were clearly indicated by our court, speaking through Judge SYKES, in disposing of the demurrers. *Kelly* v. *Applewhite*, 75 So. 753. The applicable principles of law are likewise indicated and discussed by the supreme court of the United States in *Bowerman* v. *Hamner*, 250 U. S. 504, 39 Sup. Ct. 549, 63 L. Ed. 1113, advance opinions, October term 1918, in which the supreme court, by Mr. Justice CLARKE, quoted with approval from *Brigg* v. *Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, and *Martin* v. *Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, and announced as utterly untenable any view that the directors can officiate as "figureheads," or plead utter ignorance of that which a reasonable examination of the books and papers of the bank would disclose. The court there observed:

"That a director who never makes, or causes to be made any examination whatever of the books or papers of the bank to determine its condition, and the way in which it is being conducted, does not exercise ordinary care and prudence in the management of the affairs of the bank," and a director so offending "cannot be shielded from liability because of want of knowledge of wrongdoing on his part, since that ignorance was the

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result of gross inattention in the discharge of his voluntarily assumed and sworn duty."

The court further approves the following statement in the prior case of *Martin* v. *Webb, supra*:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The observations of the supreme court of the United States are in accord with the rulings of this court in *Ellis* v. *Mercantile Co., supra, Ventress* v. *Wallace,* 111 Miss. 357, 71 So. 636, L. R. A. 1917A, 971, and other adjudications of our own jurisdiction. This law the chancellor evidently followed, and certainly we cannot say that his finding of fact are clearly wrong. It may be conceded that appellants are not guilty of criminal conduct. It yet remains that they did not exercise that degree of care in managing the bank that ordinarily prudent and diligent men would exercise under similar circumstances in the conduct and management of their own business. On the law and the facts therefore a case of liability is shown.

There is no merit in the assignment that appellants asked for and were refused a jury trial. Section 503, Hemingway's Code (Acts 1910, chapter 135), providing that, "all questions of negligence and contributory negligence shall be for the jury to determine," has no controlling application in an equity case.

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It is contended that the C. C. Kelly Banking Company was never lawfully incorporated, and therefore that appellants were never directors. This argument is based upon two contentions:

First, that under section 1028, Code of 1880, the Governor in approving a charter was required to "take the advice of the attorney general as to the constitutionality and legality of the provisions of such charter." That the attorney-general declined to approve a portion of section 4 of the charter. That the attorney-general made the following conditional approval:

"If that part of section 4 between cross marks be stricken out, the within charter will be free from objection."

That thereupon the Governor wrote the following indorsement and approval:

"The within and foregoing charter, including the whole of section 4, is hereby approved, the attorney-general's opinion to the contrary notwithstanding."

That under such circumstances the charter was illegally approved. That portion of section 4 objected to simply provided that—

"Upon the withdrawal of any stockholder from said banking company the liability of such stockholder shall cease from the date of such withdrawal as against all contracts thereafter made by said banking company."

Secondly, it is contended that section 180, Constitution of 1890, required organization in good faith and business to be commenced within one year from the adoption of the Constitution, and that this constitutional provision was not complied with within the prescribed period. There is some evidence tending to prove organization as soon as the charter was issued and approved. Books were opened in the new corporate name, a stock book secured and stock actually issued, and statements were subsequently rendered to the auditor of

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public accounts under oath expressly stating that the company was organized in 1890. But aside from the showing made on the facts we are led to the conclusion that appellants are in no position to plead that they were not directors of a corporation. Certainly there was a valid law under which a charter could be issued to a banking company. A charter was in fact issued. There were in fact stockholders. These stockholders in fact elected a board of directors, and appellants in fact accepted the position of directors and assumed to discharge the duties of this office. They cannot in equity and good conscience now be heard to say as against the stockholders that they do not occupy the position of managing directors and trustees. The sovereign state has not seen fit to complain, and appellants are in no position to complain as against the stockholders who uder the facts have been wronged by a failure of the directors to perform the duties which they have voluntarily assumed. Under this view it is unnecessary to determine whether the charter as issued and accepted was void or invalid.

There is no merit, we think, in the contention that the cause of action is barred by the three-year statute of limitation. The observations of this court in *Ventress* v. *Wallace, supra,* are controlling. It was expressly argued in the Ventress-Wallace Case that equity had no jurisdiction of a suit by the receiver of a defunct banking institution against the negligent directors and officers, and in response to this argument the court observed:

"It is earnestly contended that this is an action in tort, and that the equity court is not the proper forum."

And after discussing the *status* of directors and certain pertinent authorities, the jurisdiction of equity was justified and upheld, notwithstanding the fact that the action is one based upon the gross negligence or, in other words, the wrongdoing of the directors.

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The very recent case of *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 40 Sup. Ct. 82, 65 L. Ed.,—, advance opinions, January 1, 1920, while an action based upon federal statutes, has some bearing upon the point under discussion. The court, by Mr. Justice PITNEY, observes:

"The violation is in the nature of a tort, and the party injured may sue one or several of the joint participants."

The liability does not rest upon contract, but upon the failure of the directors and officers to perform their duty and, as said by Judge TERRAL in *Wolfe* v. *Smmons,* 75 Miss. 539, 23 So. 586:

"Every person undertaking to act for others is presumed as undertaking to act with integrity, diligence, and skill, and an action on the case for damages lay for a breach of such duties"—citing 3 Blackstone, Commentaries, 165.

The failure of duty in the case at bar is imposed both by the common law and by statute. It might well be observed in this connection that the suit is not based primarily upon any statute or upon the written guaranty above quoted. It is based upon negligence. It follows that the three-year statute of limitations does not apply. This being true, the suits are not barred by any of our statutes of limitation. It affirmatively appears that appellees did not know that the bank was insolvent or that their investments were in jeopardy until the bank was placed in the hands of a receiver, and then appellees' damages could not be made certain until after the affairs of the bank were sufficiently administered to determine whether the stock had any value. The bank was placed in the hands of a receiver in March, 1914, and the original bill in this case was filed July 9, 1915. There was a seasonable institution of the suits.

We come now to the discussion of the liability of the estate of Gustave Lowenberg, deceased. There is no

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merit, we think, in any of the separate contentions on behalf of the executrix of this estate. It is contended that Mr. Lowenberg in borrowing money from the bank could not and did not act for the bank in making loans to himself, that these excessive loans to Lowenberg caused the failure of the bank, and that this negligence cannot be laid to Lowenberg because he was the borrower and not the lender. This argument, we think, is absolutely unsound. The very fact that Lowenberg was applying for improvident loans necessarily placed him in more or less of an inconsistent position and required of him, if anything, a greater degree of care. The very defense of a majority of the board in this case is bottomed upon the attempt to show that the excessive loans to Lowenberg were made by the president and cashier without the knowledge or consent of the other directors. If this be true, and the testimony so indicates, then Lowenberg while a director permitted either the president or the cashier, or both, to extend him a line of credit largely in excess of the full amount of the capital stock, and that without authority of the managing board. It is elementary that no one can profit by his own wrong; and the contention made is untenable.

It is next contended that the written assignment by the receiver to Ascher carried with it an assignment of the bank's claim against appellees for damages. The sufficient answer to this is the fact that the written assignment itself expressly excepts Lowenberg's "individual guarantee to depositors and stockholders." In other words, the very terms of the instrument excepts the rights of the stockholders in this case. There is indeed a further contention that this exception refers to the written guaranty executed by the directors and referred to in this record as "Exhibit K;" that this written guaranty is without consideration and a product of duress and therefore void. The chancellor made no specific findings of fact in the case, but entered a general

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decree against appellants, and we are not justified in assuming that the chancellor condemned the written guaranty on account of any alleged duress. But, regardless of any question of duress, we think the exception is broad enough to reserve appellees' rights. The assignment to Ascher should be construed in the light of the circumstances surrounding its execution and the purpose to be accomplished. The bank held certain well-defined notes and securities against Lowenberg and the partnership of Lowenberg & Co., and it was primarily these bills and accounts receivable, and the securities pledged to secure the same, that the receiver was undertaking to convey. This written assignment had the sanction of the court, and its scope must be determined, as stated, by the circumstances and purposes. *Pell et al* v. *McCabe et al.*, 250 U. S. 573, 40 Sup. Ct. 43, 63 L. Ed. 1147, advances sheets, December 15, 1919. Lowenberg and the other directors by writing, at least acknowledged their liability to the stockholders and voluntarily agreed to make good the book value of appellees' stock. It matters not in equity whether this right is supported by valuable consideration or not. The present suit is not based upon the writing, but upon general liability, and there is certainly in the written assignment to Ascher language indicating the intention of the parties to reserve the stockholders' rights as against Lowenberg. The intention of the parties to this written assignment should govern, and the instrument as a whole gives no internal evidence of an intention on the part of the receiver to relinquish the claim of appelees as stokholders.

We next advert to the contention that Lowenberg's discharge in bankruptcy is a bar to the claim of liability here sought to be enforced. his argument is based, we think, upon the erroneous assumption that the liability is one in contract. As before stated, the action is in the nature of a tort predicated upon the

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breach of official duty and no judgment had been rendered, and therefore the claim had not been liquidated when the discharge was granted. As we understand the Bankruptcy Law, neither the Act of 1898 (U. S. Comp. St. sections 9585-9656) nor the amendment of 1903 makes any provision for discharging liabilities for torts unless the same have been reduced to judgment. Collier on Bankruptcy (9th Ed.) p. 386.

The proof shows that Lowenberg went into bankruptcy soon after the failure of the bank and received his discharge before the assets of the bank had been fully administered in the chancery court and before appellees could possibly tell to what extent they had been damaged by the mismanagement of the directors. Appellees were not even scheduled as creditors, and their claim at the time of the discharge was necessarily an unliquidated demand for damages, and these damages are now for the first time ultimately and finally fixed by an affirmance of the case at bar. There is perhaps another and very sufficient reason why counsel's contention is wrong. Under subdivision 4, par. 17 of the Bankrupt Act (U. S. Comp. St. section 9601), the discharge in bankruptcy does not release a claim based upon the fraud, embezzlement, misappropriation, or defalcation of a bankrupt while acting as an officer or in any fiduciary capacity. In the act of 1867, the phrase "public officer" is employed. This by the act of 1898 is changed to "officer." This provision of the bankrupt law was under consideration by McDowell, District Judge, in the case of *In re Harper* (D. C.), 133 Fed. 970. The opinion, among other things, says:

"The substitution of the word 'officer' for the phrase 'public officer' cannot properly be considered unintentional. The exact phraseology of such legislation is of too great importance to justify such a presumption. The change of language, therefore, evidenced some change of meaning, and I have been unable to ascribe to it any

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other change of meaning than to include officers of private corporations. The word 'officer' is clearly of broader meaning than the words 'public officer.' That a director and vice president of a private corporation, such as a national banking association, is an officer' of such corporation, not only in popular language, but in the language of almost countless judicial decisions and law text-books, and the acts of Congress (see, for instance, section 1, cl. 19, Bankr. Act. 1898, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3419]; sections 1783, 5207, 5208, Rev. St. [U. S. Comp. St. 1901, pp. 1213, 3496, 3497]), will not be disputed."

This case was affirmed by the circuit court of appeals in *Harper* v. *Rankin,* 141 Fed. 626, 72 C. C. A. 320. The opinion of the circuit court of appeals by BOYD, District Judge, did not expressly pass upon the question as to whether the change in phraseology "had the effect to enlarge the scope of the law," but observes that Judge McDowell "supports his decision by forceful argument.' The court further ruled that, inasmuch as Harper was the vice president and in general charge of the affairs of the bank, he was therefore "acting in a fiduciary capacity." The present case is, of course, somewhat different from the Harper Case, but the construction given paragraph 17 of the Bankruptcy Act is applicable, and this view is further strengthened by the opinion of HAND, District Judge, in the case of *In re Gudick* (D. C.), 26 Am. Bankr. Rep. 362, 186 Fed. 350, in which the opinion in *In re Harper, supra,* was followed and approved. See, also, 7 C. J. 407.

For the reasons indicated, Lowenberg was not discharged from liability in this case.

It is next contended that the failure to register and probate the claim in the chancery court having jurisdiction of Lowenberg's estate within one year after the first publication of notice to creditors as provided by section 1775, Hemingway's Code, bars any action there-

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on. This question, we think, has been put at rest by previous adjudications of our court. Judge Calhoon, speaking for this court in *Feld* v. *Borodofski,* 87 Miss. 727, 40 So. 816, said:

"We do not think a claim for damages is one for probate against the estate of a deceased person, under Code 1892, section 1933. That section has reference to contractual claims, and not to those *ex delicto.* It must be such a claim as might be paid, if the estate were solvent, by an executor or administrator, and which, if *bona-fide* and proper, would afford him protection. *Sumrall* v. *Sumrall,* 24 Miss. 258. This could never be with an uncertain demand for damages for assault and battery. The claim to be probated must be one which, if paid by the executor or administrator, would, *prima-facie,* entitle him to credit. *Gray* v. *Harris,* 43 Miss. 421. The terms of the statute fully sustain this, as does the reasoning of the court in *Robinett* v. *Starling,* 72 Miss. 652, 18 So. 421."

And it seems to us in the case at bar that the reasoning of our court in *Robinett* v. *Starling,* referred to by Judge Calhoon, and likewise the reasoning of our court in *Jones* v. *Bank,* 71 Miss. 1023, 16 So. 344, are applicable to the facts of the present suit. This we believe disposes of all separate contentions made by Clara Lowenberg, executrix.

Can the liability imposed by the final decree against J. M. Knotts, cashier of the bank, be sustained? The proof shows that Knotts was a director prior to January, 1908, since which time he was the cashier in the active discharge of his duties. During the period complained of he was not a director, but the cashier. It is contended that he is not chargeable with any neglect of duty and that he should not be required to respond in damages for any failure of the directors properly to manage the institution. We have given the separate contention of the cashier protracted consideration and

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reach the conclusion that there is sufficient evidence to support the general decree rendered against him. Mr. Morse says:

"The cashier is the chief executive officer, through whom the whole financial operations of the bank are conducted. . . . He is properly the executive agent of the directors." Morse on Banks (5th Ed.), section 152.

In *Merchants' Nat. Bank* v. *State Nat. Bank,* 10 Wall. 604, 19 L. Ed. 1008, the supreme court of the United States, by Mr. Justice SWAYNE, observed:

"The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit this authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Bank* v. *Norton,* 1 Hill, 501; *Bank of Vergennes* v. *Warren,* 7 Hill, 94; *Beers* v. *Phœnix Glass Co.,* 14 Barb. 358; *Far & Mech. Bank* v. *Butchers' & Drov. Bank,* 14 N. Y. 624; *Bank* v. *Aymar,* 3 Hill, 262; *Barnes* v. *Bank,* 19 N. Y. 156."

It is said in 7 C. J. 567: "The cashier is liable for losses resulting from his illegal, fraudulent, or tortious acts, or from his negligence."

The proper limitations upon this civil liability are then discussed in Corpus Juris, but we do not regard the facts of the present case as bringing the cashier within any of the exceptions noted and discussed by the author. A fair statement of the law is contained, we think, in *Wynne* v. *Tallapoosa County Bank,* 168 Ala.

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469, 53 So. 228. The court, by MAYFIELD, J., on this point says:

"As to the liability of the cashier to the bank, for allowing overdrafts by depositors, for taking improper securities for loans made by the bank, and for failing to conform to the by-laws of the corporation, as to making loans without conferring with the discount board, etc., we think the law different from that which the chancellor seems to have applied to this case. It is true, as contended by counsel for appellee, and as the chancellor seems to have decided, that the cashier of a bank is responsible to the bank for all losses it suffers directly from his failure in any respect in his official duty, and that it cannot avail him that he was so ordered or authorized so to act, by the directors, if the directors had no authority to so order or direct him, nor to do the acts themselves which they authorized him to do, and he knows or ought to know that such act done or authorized was unlawful. But a bank, like any other corporation, can act only by and through its officers and agents, and if the directors themselves can do an act, so far as they or the bank is concerned, they can authorize the cashier to do it; and if he does it under their authority, he is not liable to them or to the bank, though he might be in some cases liable to third parties. He is likewise liable to the bank for all damages it suffers on account of any wrongful official acts of his, or of any from any unauthorized assumption of power on his part, or for any from his failure to obey any proper and valid instruction from his superior officers in the bank. He is not liable, as the directors are, for the errors or improper acts of his subordinate officers such as tellers, bookkeepers, etc., or agents in the bank."

In *Austin* v. *Daniels*, 4 Denio (N. Y.) 299, the opinion states:

"Bank officers are but agents of the corporation, and if they transcend or abuse their powers are as much

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responsible to their principal as are the agents of an individual. This ought to be regarded as too plain to require argument or authority."

And in *Commercial Bank* v. *Ten Eyck,* 48 N. Y. 305, the court by EARL, C., said.

"The defendant, as cashier, was a financial agent of the plaintiff, intrusted to some extent with the management of its affairs. As such agent he was bound to exercise reasonable skill and ordinary care and diligence in the discharge of his duties. Story's Agency, section 182, etc. If he failed in such skill or omitted such care and diligence, and in consequence thereof the plaintiff suffered damages, he is liable to respond. And much more is he liable to respond if he caused any damage to the plaintiff by any illegal, fraudulent, or tortious act."

There is no proof in this case that Knotts appropriated any of the funds of the bank, but there is evidence to show that he very negligently made excessive loans and permitted the directors themselves to overdraw very largely their accounts. Mr. Kelly, the president, testified that perhaps ninety per cent. of all loans were actually made by the cashier. It is undisputed that the notes and securities executed by Lowenberg and the other directors were in the handwriting of Mr. Knotts and his assistant, and there is no attempt to deny knowledge by the cashier that Lowenberg was borrowing too much money from the bank. The cashier is in the attitude of negotiating these loans and permitting these overdrafts without authority from the board of directors, or at least a majority of them. The point is made that the bank had no by-laws and therefore the cashier violated no by-laws or rule of the institution. The fact that there were no by-laws can be no justification for the failure of the cashier reasonably to perform his duty as the chief executive officer of the bank. If Mr. Knotts had advised the directors, Boyd, Falk, or Alexander, of

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the true condition of Lowenberg's account, the failure of the bank would probably have been averted. He did not take counsel with the very directors for whom he was acting, but acquiesced in and permitted the president to sanction and himself executed loans that were wrong and unlawful. This is sufficient to uphold liability. We do not mean to hold that the cashier is responsible for excessive loans authorized by the board of directors. If the acts of the cashier are not first approved by the board of directors and he proceeds upon his own judgment in the premises, then certainly he is bound to exercise that degree of skill and care and diligence required of an agent generally.

But there are other specific points which on this record are troubling. In the first place, B. L. Clark was a director from March, 1905, until the failure of the bank, so far as the bank records show. It appears that he was present at the meetings of the board from March, 1905, to 1910, an that he signed the statements of the directors rendered the auditor up until October, 1910. Soon thereafter he moved to Oklahoma, but seems never to have tendered his resignation, and no successor was elected. Clark became indebted to one S. P. Rimmer and assigned his stock to Rimmer as collateral security for a loan of four thousand, eight hundred and fifteen dollars. Thereafter Clark failed in business and went into bankruptcy, and one Witherington was appointed his trustee in bankruptcy. The bill charged that the forty-five shares of stock had been transferred and delivered to Rimmer and that Rimmer was the *bona-fide* holder thereof; that Rimmer had a settlement with Clark whereby Clark executed his note due January 1, 1915, for four thousand, five hundred dollars; and that this note was secured by forty shares of the stock. Both Rimmer and Witherington joined as complainants, and Rimmer as pledgee was permitted to recover as pledgee to the extent of his note; and Witherington,

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trustee in bankruptcy, was permitted to recover for the balance of the book value of the B. L. Clark stock. The suit in this case is predicated upon the idea that the losses through the negligence of the directors accumulated from 1909 to 1914. We are led to the conclusion that Rimmer as a *bona-fide* pledgee of this stock should be permitted in equity to sue for and recover for its destruction by the directors, but that the trustee in bankruptcy has no superior right than the bankrupt enjoys in his own person, and that, inasmuch as B. L. Clark could not maintain this suit as against his fellow directors, his trustee cannot maintain the same. The decree allowing Witherington, trustee, a recovery in excess of Rimmer's note, will be reversed.

It appears that Mrs. Walter Burgess sues in her own right and as executrix of the will of Walter Burgess, deceased. We understand that Mrs. Burgess owns stock in her own right and claims some of the stock as executrix of her husband's will. It appears further that Walter Burgess was a director from January 3, 1908, until 1912, and that he signed statements with the other directors up to the time of his death, and while living was supposed to be an active director in the bank. There is testimony indicating that Capt. Burgess was in ill health and on that account was in ignorance of the bad management of the bank. We do not think, however, that a director is in a position to profit by his own negligence, and it woud be inequitable to permit one negligent director to sue and recover damages, as the result of gross negligence attributable to the entire board of directors. If so, such director should sue himself. No fact or circumstance has been pointed to that would estop Mrs. Burgess to recover upon her individual stock, and to that extent the finding of the chancellor will be upheld.. That portion of the decree which awards a recovery to Mrs. Fannie Burgess, executrix of the estate of Wal-

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ter Burgess, deceased, will be reversed, and judgment entered here for appellants on this point.

The decree in favor of L. M. Kelly is attacked on two grounds: First, upon the theory that L. M. Kelly was not the true legal owner of the stock which he sues for; and, second, pending litigation he died and there was no legal revivor in the name of his personal representative. On the first ground of attack the proof is sufficient to uphold the decree rendered by the chancellor. On the second ground we do not think that appellants are in a position to complain. It is contended that there is no pleading to support a decree in favor of George L. Teat, administrator of the estate of L. M. Kelly, and no lawful revivor. It is conceded that Kelly died in October, 1918, in vacation, after the cause had been submitted to the chancellor for final determination. It is conceded further that George L. Teat, solicitor for L. M. Kelly, properly filed in the court a written suggestion of the death of L. M. Kelly, and asked for the appointment of an administrator *ad litem* as provided in section 2019, Code of 1906. There is no decree in this record actually reviving the cause in the name of George L. Teat, administrator, but the final decree does adjudicate:

"That George L. Teat, administrator of the estate of L. M. Kelly, deceased, owner and holder of fifty shares of said stock, do have and recover," etc.

There was recently filed in this court a motion for a writ of *certiorari* requiring the clerk to certify as a part of the present record the petition for the appointment of George L. Teat as administrator and the decree acting upon this petition and making the appointment. This motion was resisted by appellants on the general ground that such record is not properly a part of the present record, and their contention on a former day of this term was upheld. The present record reserves

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no exceptions or objections to the appointment of the administrator or to the language of the final decree permitting recovery in the name of the administrator, and the point therefore appears to be a technical one. We are asked to reverse that portion of the decree for a reason never advanced or presented to the trial court, and this without any effort to show by the record or otherwise that the administrator was not in fact lawfully appointed pending litigation. If Mr. Teat was in fact lawfully appointed administrator, and no one disputes this fact, then the final decree is proper and lawful. It is certainly not void on its face, and no equitable showing has been made as to why the case should be reversed on this point.

That portion of the final decree awarding damages to Mrs. Burgess as executrix and to Witherington as trustee in bankruptcy of B. L. Clark is reversed, but the adjudication in favor of the other complainants in the bill is affirmed.

Equity suggests that the costs be prorated. Taking into consideration the number of original complainants and the many issues presented by the one voluminous record, we are of the opinion and direct that one-eighth of the costs of this appeal be taxed against appellees Mrs. Fannie Burgess, executrix, and Witherington, trustee; the remaining costs to be paid by appellants.

Affirmed in part; reversed in part.

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INDEX.

ABATEMENT AND REVIVAL.

See PLEADING AND PRACTICE.

ACTIONS—RIGHT AND CAUSE.

1. *Parent and child. Duty of support. Enforcement by child of duty to support.*

While it is the duty of a parent to support his infant child, yet the existence of this obligation on the part of a parent does not justify a court of equity in entertaining a bill or action by the child against its father to determine in advance the amount of support and maintenance and compel obedience to its orders in premises by imposing a lien upon property of the parent or otherwise. *Rawlings* v. *Rawlings*, 140.

2. *Same.*

The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel the performance of this duty. The duty may be enforced however under statute, or directly, as where a stranger supplies an infant with necessaries and recovers therefor against the parent. *Ib.*

3. *Husband and Wife. Husband entitled to recover for loss of consortium of injured wife.*

The husband may recover for such injuries as result in loss to him inflicted upon his wife, even where the statutes allow the wife to recover for injuries to herself in her own name as our statute does. *Brahan* v. *Meridian Light & Ry. Co.*, 269.

4. *Same.*

The statute allowing a wife to sue for injuries in her own name was not intended to displace the husband as the head of the family nor affect his domestic rights, to the domestic services which the wife renders or would render but for her injuries, nor prevent him from recovering damages *per quod consortium amisit. Ib.*

5. *Negligence. Comparative negligence statute applies to action by husband for wife's personal injuries.*

Hemingway's Code, section 502, Laws 1910, chapter 135, providing that contributory negligence shall not bar but limit recovery, applies to a suit by a husband for injury to his wife; the term "personal injuries" in such statute being used merely to distinguish between injuries to person and injuries to property. *Ib.*

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ACTIONS—RIGHT AND CAUSE.

ACTIONS—RIGHT AND CAUSE—Continued.

6. *Equity. Cross-bill based on mistake in delivery of shipment of mules by carrier was germane to issue by carrier to recover value of shipment erroneously delivered.*

In a suit by a carrier to recover the value of a carload of mules delivered to defendants by mistake instead of another shipment intended for them, but delivered to a third party, a cross-bill in equity based on freight paid, expenses of feeding and handling, and damages to the second shipment, could be maintained; the two demands growing out of one transaction and being vitally related, so that the issues presented by the cross-bill were germane to the issues made by the original bill, particularly in view of the fact that if defendants could not maintain their cross-bill they would be forced to go to a foreign jurisdiction to prosecute their cross-action. *Schaff* v. *Kahn & Bernstein*, 412.

7. *Master and servant. Violation of statute limiting working hours gave no right of action to injured employee not working about machinery.*

Law 1916, chapter 239 (Hemingway's Code, sections 4523-4524) making it unlawful for parties engaged in manufacturing or repairing, to work an employee more than ten hours a day applies only to employees working with or around machinery and its violation gave no right of action for injury to an employee unloading from cars lumber which other employees were taking to the planing machine. *Handy* v. *Mercantile Lumber Co.*, 489.

8. *Action for death of wife and daughter in same accident may be joined.*

Causes of action in favor of the same plaintiff and against the same defendant, of the same nature, and subject to the same character of defense and judgment may be joined in one declaration, even though the pleas thereto may be different. *Hines* v. *McCullers*, 666.

9. *Same.*

The rights of action by the same plaintiff for the benefit of the same parties to recover damages for the death of plaintiff's wife and daughter in the same accident, under Laws 1914, chapter 214 (Hemingway's Code, section 501), are of the same nature and subject to the same character of defense and judgment and may be joined in one declaration. *Ib.*

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ACTIONS—RIGHT AND CAUSE—APPEAL AND ERROR.

ACTIONS—RIGHT AND CAUSE—Continued.

10. *Death. Contributory negligence of beneficiary does not bar recovery.*
An action under Laws 1914, chapter 214 (Hemingway's Code, sec. 501) permitting recovery for death in cases where the injured person could have maintained an action, is not defeated by the contributory negligence of one of the beneficiaries, even to the extent of that beneficiary's interest. *Ib.*

11. *Parties. Plaintiff must have legal title of choses in action at institution of suit.*
Plaintiff, in a court of law, in order to maintain a suit upon a chose in action must have the legal title to the same at the time he brings his suit and where the evidence showed that he did not acquire the title until two days after the suit was brought, the court should have given a peremptory instruction for the defendant. *Fire & Marine Ins. Co.* v. *Daniel Auto. Co.*, 745.

12. *Banks and banking. Pledgee of stock may join in suit against directors for negligence.*
A bona-fide pledgee of bank stock may join as a party complainant in a stockholders' suit in equity against the directors for negligence resulting in the destruction of the stock. *Boyd et al.* v. *Applewhite et al.*, 879.

13. *Banks and banking. One negligent director may not sue his associate directors for gross negligence.*
One negligent director may not sue his associate directors for gross negligence resulting in the bank's failure and a destruction of the capital stock. *Ib.*

14. *Banks and banking. Trustee of negligent bankrupt director cannot join in stockholders' suit against other directors for losses from their negligence.*
A trustee in bankruptcy for one negligent director, who has been adjudicated a bankrupt, should not be permitted to join as a party complainant in a suit by stockholders against the directors for gross negligence resulting in the destruction of the capital stock. *Ib.*

APPEAL AND ERROR.

1. *Court in determining the correctness of the decree of the lower court will accept the evidence of the successful party.*
Where there is a conflict in the evidence the supreme court on appeal will accept the evidence of the successful party and determine from that as to whether or not the chancellor's decree will be upheld . *Biles* v. *Walker*, 98.

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APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

2. *Instructions. Harmless error.*

In an action against a private hospital for injuries sustained through negligent treatment, the giving of an instruction that, if plaintiff was injured as a result of the negligence of the employees and nurses of the hospital, as testified by plaintiff's witnesses, the jury should find for the plaintiff, though not technically correct was not reversible error. *Meridian Sanatorium* v. *Scruggs*, 330.

3. *Same.*

An instruction should state a hypothesis and the jury should be told that if they believe from the evidence the facts constituting such hypothesis they should find for the plaintiff. *Ib.*

4. *No reversal because instructions not technically correct.*

The supreme court will not reverse a case because instructions are not happily phrased or because not exactly technically correct, so long as the instructions are not misleading or the inaccuracy complained of could have had no influence in reaching a verdict that could be said to be improper. *Ib.*

5. *Erroneous instruction on damages harmless where verdict for defendant.*

In an action against a railroad for the death of a mule an instruction on comparative negligence was harmless where the verdict was for the defendant. *Henderson & Mathis* v. *Hines*, 339.

6. *Whether cross-bill presents matter of common-law or equity jurisdiction will not be first considered on appeal.*

The question as to whether a cross-bill presented matter purely of common law jurisdiction and not equity jurisdiction cannot arise on appeal to the supreme court where no such objection was raised, in the court below. *Schaff* v. *Kahn & Bernstein*, 412.

7. *Stenographer's notes not filed pursuant to notice given within thirty days after adjournment of term will be stricken from record.*

Under Laws 1910, chapter 111, par. (D) Hemingway's Code, section 585, so providing, notice to the stenographer to file his notes of oral evidence taken at a trial must be given within thirty days of the adjournment of the term of court at which the trial was had and where the appellant did not give such notice until thirty-five days had elapsed after the adjournment of the term, such evidence on appeal will, on motion, be stricken from the record, though not claimed to be incorrect in any particular. *White* v. *Board of Suprs.*, 434.

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APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

8. *Criminal law. Where guilt of defendant manifest improper remarks of district attorney not reversible error.*
Where on a trial for murder the guilt of the defendant was manifest from the evidence and the jury under their oaths could not have arrived at any other verdict than that of guilty, it was not reversible error for the district attorney in his argument to comment on the fact that the defendant did not testify, through such comment was in violation of Code 1906, section 1918 (Hemingway's Code, section 1578) forbidding comment. *House* v. *State*, 436.

9. *Equity. Relief not supported by pleadings, ground for reversal.* The supreme court on appeal will reverse a decree of the lower court where the relief granted was not specifically prayed for and should not have been granted under the general prayer, for the reason that it was not supported by any allegation in the bill of complaint. *Rutland* v. *McIntosh*, 437.

10. *Review. Truth of evidence.*
The supreme court on appeal will accept as true evidence for the defendant which the trial judge improperly excluded and then directed a verdict for the plaintiff. *Ill. Cent. R. Co.* v. *Threefoot Bros. & Co.*, 468.

11. *In this case there was a motion to set aside a former judgment of* reversal, and determine the case on its merits; the former judgment was set aside, and the judgment affirmed. *Conner* v. *State*, 539.

12. *Court will not reverse chancellor unless findings are clearly wrong.* The supreme court on appeal should not reverse the findings of a chancellor on facts unless he is clearly wrong. *Gulf Transp. Co.* v. *Fireman's Fund Ins. Co.*, 655.

13. *Questions arising on trial of plea in abatement are reviewable on appeal from final judgment.*
Questions arising on the trial of the issue raised by plea in abatement are reviewable on appeal from final judgment on the merits, since an appeal from final judgment for plaintiff brings up either the entire record in the case or so much thereof as is necessary for the decision of all questions relating thereto that are open for review by the appellate court. *Y. & M. V. R. Co.* v. *McNeely*, 803.

14. *Criminal law. Improper prejudical argument reversible error.* Where it clearly appears that improper argument in the trial substantially prejudiced the rights of the other party, reversal for such error will follow. *Darby* v. *State*, 869.

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APPEAL AND ERROR—Continued.

15. *That record did not show decree of revival on death of complainant held not reversible error in view of record on appeal.*

Where, in a suit by stockholders against negligent directors for damages for the loss of capital stock, it is shown that one party complainant died after the cause had been submitted to the chancellor for final determination, that a proper suggestion in writing of the complainant's death is made and a petition filed asking for an administrator *ad litem* to prosecute the suit, and a final decree adjudicates recovery in the name of the administrator, such decree will not be reversed on account of the absence in the record of a decree reviving the cause in the name of the said adminstrator *ad litem*, especially where the record reserves no exception or objection to the said appointment or to the language of the final decree awarding recovery in the name of the administrator, and no showing whatever made that an administrator *ad litem* was not in fact appointed and the cause revived in his name. *Boyd et al.* v. *Applewhite et al.*, 879.

ANIMALS.

Defective indictment charging alteration of brand.

An indictment under Code 1906, section 1054 (Hemingway's Code, section 782), charging the alteration or defacement of the mark or brand of an animal, is fatally defective where it does not charge that the mark or brand altered by the defendant was intended to designate ownership of the animal. *Smith* v. *State*. 37.

ASSUMPTION OF RISK.

See MASTER AND SERVANTS.

ATTORNEY AND CLIENT.

1. *Attorney entitled to retainer though some services performed on Sunday.*

Where an attorney made a retainer contract with his client on a secular day and stayed in town for ten days at the request of his client, neglecting to attend to other matters waiting to close up the business of his client, he was entitled to recover a reasonable fee as a retainer and a reasonable amount for his time in remaining in town instead of leaving to attend to other matters, though some of the services rendered were performed on Sunday in violation of section 1366, Code 1906 (Hemingway's Code, section 1102), such a contract not being an indivisible one. *Jones* v. *Brantley*, 721.

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ATTORNEY AND CLIENT—BANKS AND BANKING.

ATTORNEY AND CLIENT—Continued.

2. *Sunday. Services of attorney in rearranging partnership business not work of necessity or charity.*
Services rendered by an attorney in rearranging a partnership business is not a work of necessity or charity under Code 1906, section 1366 (Hemingway's Code, section 1102) prohibiting the performance of work on Sunday except housework or other work of necessity or charity. *Ib.*

3. *Sunday. Certain legal services may be performed on Sunday.*
There are some services that an attorney may lawfully perform on Sunday as the law expressly authorizes certain suits and other legal matters to be done on Sunday and where his contract is not an indivisible one the performance of other work on Sunday prohibited by law does not vitiate the entire contract. *Ib.*

BAIL.

Amount reduced where defendant poor and in ill health.
Where a defendant charged with crime was required to give an excessive bond, the supreme court on appeal in a *habeas-corpus* proceeding will reduce the amount of the bond where it appears that on account of his poverty the defendant will otherwise be denied bail and where his physical condition is such that his health may be endangered by confinement. *Ex Parte Goldsby.* 479.

BANKS AND BANKING.

1. *Evidence of gross negligence in a director not sufficient to convict of knowingly receiving deposits.*
Under Code 1906, section 1169, a bank director cannot be convicted, for receiving deposits "having good reason to believe that the bank was then and there insolvent" merely upon evidence showing him to have been grossly negligent in the discharge of his duty as a director of the bank. *Buckley* v. *State*, 66.

2. *Directors and majority stockholders permitting excessive loans to directors are liable to minority stockholders for loss of their stock.*
The directors of a bank who own a majority of the capital stock and who permit improvident and excessive loans to be made by the bank's officers to the individual directors themselves, causing the bank to become insolvent and go into the hands of a receiver and the capital stock to become worthless, are liable in damages to the minority stockholders for the loss of their stock. *Boyd* v. *Applewhite*, 879.

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BANKS AND BANKING.

BANKS AND BANKING—Continued.

3. *Directors not examining books and securities to determine bank's condition do not exercise ordinary care.*

The directors of a bank who never make or cause to be made an examination of the books and securities of the bank to determine its condition and the way it is being conducted do not exercise ordinary care and prudence in the management of the bank's affairs. *Boyd* v. *Applewhite*, 879.

4. *Directors whose negligent supervision renders minority stock valueless cannot plead ignorance.*

Directors of a bank who negligently fail to exercise reasonable control and supervision of the bank's officers cannot, as against the claims of innocent stockholders whose stock has been rendered worthless by such negligence, plead ignorance of that which by proper diligence and inquiry the directors ought to know. *Ib.*

5. *Evidence held to sustain chancellor's decree for minority stockholders against directors permitting excessive loans.*

In a suit in equity by stockholders against the directors to recover losses sustained through neglect of duty, misconduct, and negligence of the directors causing the bank to become insolvent and the capital stock valueless, the findings of fact by the chancellor and his decree in complainant's favor cannot be said to be clearly wrong, where there is testimony tending strongly to prove that the paid-in capital stock of the bank was one hundred thousand dollars and that the directors by inattention, by failure to enact by-laws governing the officers, by failure to examine the books, papers, and securities of the bank, negligently permitted the president and cashier to lend the individual members of the board of directors the aggregate sum of two hundred and twenty-nine thousand dollars, a part of which is evidenced by large overdrafts, as a result of which the institution was wrecked and the capital stock rendered worthless. *Ib.*

6. *In suit by minority stockholders against directors for losses resulting from their negligence directors cannot plead invalidity of charter.*

Where it is shown incorporators apply for and obtain a charter incorporating a bank under a law that is valid, issue stock in due course, elect officers and a board of directors and actually conduct business in the corporate name, the chosen directors, who accept the position and assume to discharge the duties of their office, cannot in a suit in equity against them by minority

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BANKS AND BANKING.

BANKS AND BANKING—Continued.

stockholders plead that because the charter of the bank is invalid they are not directors of a corporation. *Ib.*

7. *Liability of directors for negligence is tortious, so that they may be sued jointly or severally.*

The liability of bank directors for negligence in the performance of their duties does not rest upon contract, but is based upon the violation of duty and is in the nature of a tort, and stockholders who are injured by their negligence may sue one or several of the joint participants. *Ib.*

8. *Director sued for loss to stockholders from excessive loans to himself cannot plead that he did not act for the bank.*

A bank director who applies for and receives loans in excess of the capital stock of the bank, causing the bank's failure, is, in a suit by stockholders against him and the other directors for gross negligence, as a result of which the stock is made worthless, estopped to plead that he did not act for the bank in making such improvident loans to himself. *Ib.*

9. *Receiver's written assignment of bank's claims against negligent directors construed to preserve minority stockholder's action against such director.*

Where an insolvent bank is placed in the hands of a receiver as a result of the gross negligence of the directors, and the directors execute a writing guaranteeing depositors and stockholders against loss, and the receiver under the approval and by decree of the chancery court executes a written assignment to a purchaser of the notes, securities, and claim of the bank against one particular director, a provision in the written assignment expressly excepting from the operation of the conveyance the director's "individual guaranty to depositors and stockholders' preserves the right of action by stockholders against such negligent director whose indebtedness is thereby assigned for negligence resulting in the loss of the capital stock. *Ib.*

10. *Assignment by bank's receiver of its claim against director should be construed with reference to the circumstances.*

The written assignment by a receiver of an insolvent bank of the bills and accounts receivable and the claim of the bank against an individual member of the board of directors in pursuance of a decree authorizing the receiver to sell the bank's said claim should be construed and its scope determined by the circumstances and the purposes to be accomplished. *Ib.*

11. *Bankruptcy. Negligent bank director sued by minority stockholders cannot plead discharge in bankruptcy where demands were not reduced to judgment when discharge was granted.*

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BANKS AND BANKING.

BANKS AND BANKING—Continued.

A discharge in bankruptcy cannot be pleaded in bar to a suit in equity by stockholders against a negligent director for losses occasioned by mismanagement of the bank's affairs, where the demands sued for were unliquidated and had not been reduced to a judgment at the time such discharge was granted. *Boyd* v. *Applewhite*, 879.

12. *Bankruptcy. Director is "officer" within exception of debts created by fraud or defalcation.*

The director of a banking corporation is an "officer" within the meaning of section 17, subd. 4, of the Bankrupt Act (U. S. Comp. St. section 9601), excepting from discharge debts created by fraud, misappropriation, or defalcation of a bankrupt while acting as an officer or in a fiduciary capacity. *Ib.*

13. *"Cashier" is bank's chief executive officer.*

The "cashier" of a bank is the chief executive officer through whom the whole financial operations of a bank are conducted. *Ib.*

14. *Cashier is liable for losses resulting from his tortious acts.*

The cashier of a bank is liable for losses resulting from his illegal, fraudulent, or tortious acts, or from his negligence. *Ib.*

15. *Director's authorization no defense as to cashier's negligence.*

The cashier is responsible for losses suffered directly from his failure to exercise reasonable skill and ordinary care and diligence in the discharge of his official duties. It is no defense that the directors, or any one of them, authorized him to do that which he knew, or ought to have known, was unauthorized or unlawful. *Ib.*

16. *Cashier making excessive and unauthorized loans to a director is liable for resulting losses.*

A cashier who negotiates excessive and improvident loans to a director without authority from a majority of the board of directors is responsible for losses directly occasioned by such negligence. *Ib.*

17. *Pledgee of stock may join in suit against directors for negligence.*

A *bona-fide* pledgee of bank stock may join as a party complainant in a stockholders' suit in equity against the directors for negligence resulting in the destruction of the stock. *Ib.*

18. *One negligent director may not sue his associate directors for gross negligence.*

One negligent director may not sue his associate directors for gross negligence resulting in the bank's failure and a destruction of the capital stock. *Ib.*

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BANKS AND BANKING—Continued.

19. *Trustee of negligent bankrupt director cannot join in stockholder's suit against other directors for losses from their negligence.*
A trustee in bankruptcy for one negligent director, who has been adjudicated a bankrupt, should not be permitted to join as a party complainant in a suit by stockholders against the directors for gross negligence resulting in the destruction of the capital stock. *Ib.*

20. *Executrix of negligent director cannot sue surviving negligent directors for gross negligence.*
It would be inequitable to permit the executrix of one negligent director to sue the surviving directors for damages as a result of gross negligence attributable to the entire board of directors. *Ib.*

See APPEAL AND ERROR.

BANKRUPTCY.

1. *Negligent bank director sued by minority stockholders cannot plead discharge in bankruptcy where demands were not reduced to judgment when discharge was granted.*
A discharge in bankruptcy cannot be pleaded in bar to a suit in equity by stockholders against a negligent director for losses occasioned by mismanagement of the bank's affairs, where the demands sued for were unliquidated and had not been reduced to a judgment at the time such discharge was granted. *Boyd et al.* v. *Applewhite et al.*, 879.

2. *Director is "officer" within exception of debts created by fraud or defalcation.*
The director of a banking corporation is an "officer" within the meaning of section 17, subd. 4, of the Bankrupt Act (U. S. Comp. St. section 9601), excepting from discharge debts created by fraud, misappropriation, or defalcation of a bankrupt while acting as an officer or in a fiduciary capacity. *Ib.*

BONDS.

See MUNICIPAL CORPORATIONS.

BROKERS.

Employee of buyers who refused commission offer from seller's agent and acted for buyers not entitled to recover half of commission voluntarily paid their agent by sellers.

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BROKERS—Continued.

Where the bookkeeper for buyers of a plantation did not accept the proposition of the agent for the sellers to act as sub-agent, but refused his offer to share commissions and elected to represent his employers in an effort to buy at a lower than the list price, negotiating direct with the sellers, and acting for the buyers without intimating either to the sellers' agent or the sellers that he was representing the latter, he is not entitled to recover from the sellers' agent half of the commissions voluntarily paid such agent by the sellers. *Henry* v. *Lamensdorf*, 648.

BULK SALES LAW.

1. *Fraudulent conveyance. Sale of stock of goods in violation of bulk sales law is void.*
   A sale of a stock of goods in violation of the Bulk Sales Law is fraudulent and void. *Peters Branch International Shoe Co.* v. *Gunn*, 679.
2. *Creditors may recover goods fraudulently sold in bulk or hold the buyer for value.*
   Where a stock of goods was sold in violation of the Bulk Sales Law, a creditor may proceed against the property if it remains in the hands of the purchaser, or waive the tort and sue the purchaser for the value of the goods or he may pursue both remedies. *Ib.*
3. *Fraudulent conveyance. Disposal by buyer of goods fraudulently sold in bulk does not affect his liability.*
   The fact that the buyer of a stock of goods who had not complied with the Bulk Sales Law had disposed of them before the creditors' suit was filed, does not affect his liability for he stands in the position of a trustee of the property for the creditors. *Ib.*
4. *Fraudulent conveyance. Payment of proceeds of void sale in bulk to other creditors does not relieve buyer.*
   The application by the seller of goods in violation of the Bulk Sales Law, of the proceeds of the sale to the payment of some of his creditors, does not affect the buyer's liability to a creditor who had not received any of the proceeds. *Ib.*
5. *Fraudulent conveyance. Existence of other creditors not made parties does not affect right of complainant creditor.*
   A creditor may recover from the buyer of goods sold in violation of the Bulk Sales Law the full amount of his claim if it is less than the value of the goods, though there may be other creditors, not made parties to the suit, whose total claims greatly exceed the value of the goods. *Ib.*

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BULK SALES LAW—CODE CITED AND CONSTRUED.

BURGLARY.

Instructed acquittal proper where proof failed to show ownership as alleged.

In a prosecution for burglary where the indictment laid the ownership of the burglarized building in a railroad company, a corporation, but the evidence failed to show that such railroad company was either a *de jure* or *de facto* corporation, the court should have given a peremptory instruction for the acquittal of the defendant. *House* v. *State*, 43.

CARRIERS.

See ACTIONS—RIGHT AND CAUSE; RAILROADS.

CIRCUIT COURT.

See JURISDICTION.

CODE CITED AND CONSTRUED.

§§ 66, 558 (Hem.). Justices of the peace. Refusal of circuit court on appeal to allow amendment by inserting names of partners held reversible error. *McCullar & Co.* v. *Mink*, 829.

§ 81 (1906). State revenue agent suing for delinquent taxes pending appeal from assessment has no right to commissions. *Harrison County* v. *Robertson*, 387.

§ 84 (1906). Justice of the peace. Defective certification of record not cured or waived. *Xydias* v. *Pellman*, 400.

§§ 86, 775 (1906). Justices of the peace. Refusal of circuit court on appeal to allow amendment by inserting names of partners held reversible error. *McCullar & Co.* v. *Mink*, 829.

§§ 165, 995 (1906). Judges. Relation to attorneys does not disqualify, when. *Norwick Union Fire Ins. Co.* v. *Standard Drug Co.*, 510.

§ 501 (Hem.). Action. Action for death of wife and daughter in same accident may be joined. *Hines* v. *McCullers*, 666.

§ 502 (Hem.). Negligence. Comparative negligence statute applies to action by husband for wife's personal injuries. *Brahan* v. *Meridian Light & Ry. Co.*, 269.

§ 503 (Hem.). Jury. Statute making negligence and contributory negligence jury questions has no application in equity case. *Boyd et al.* v. *Applewhite et al.*, 879.

§ 585 (Hem.). Appeal and error. Stenographer's notes not filed pursuant to notice given within thirty days after adjournment of term will be stricken from record. *White et al.* v. *Board of Sup'rs*, 434.

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CODE CITED AND CONSTRUED.

CODE CITED AND CONSTRUED—Continued.

§ 707 (1906). Venue. Joint action may be brought where either defendant resides. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

§ 793 (1906). Criminal law. Giving of unrequested instructions. *Davenport* v. *State*, 548.

§ 1029 (1906). Indictment and information. Error to permit amendment of indictment. *Kemp* v. *State*, 580.

§ 1054 (1906). Animals. Defective indictment charging alteration of brand. *Smith* v. *State*, 37.

§ 1081 (1906). Seduction. Corroboration. Effect of successive acts. *King* v. *State*, 230.

§ 1146 (1906). Landlord and tenant. Inducing tenant to breach contract. *Evans* v. *State*, 252.

§ 1169 (1906). Banks and banking. Evidence of gross negligence in a director not sufficient to convict of knowingly receiving deposits. *Buckley* v. *State*, 66.

§ 1366 (1906). Attorney entitled to retainer though some services performed on Sunday. *Jones* v. *Brantley*, 721.

§ 1645 (Hem.). Railroads. Prima-facie statute does not relieve plaintiff of final burden. *Hines* v. *McCullers*, 666.

§ 1775 (Hem.). Executors and administrators. Unliquidated claim against negligent bank director is not a claim for probate against his estate. *Boyd et al.* v. *Applewhite et al.*, 879.

§ (1918 (1906). Criminal law. Where guilt of defendant manifest improper remarks of district attorney not reversible error. *House* v. *State*, 436.

§ 2107 (1906). Executors and administrators. Unliquidated claim against negligent bank director is not a claim for probate against hie estate. *Boyd et al.* v. *Applewhite et al.*, 879.

§ 2732 (1906). Justice of the peace. Service of summons by deputy of regular constable insufficient. *Postal Telegram-Cable Co.* v. *Thompson*, 379.

§ 2773 (1906). Mortgages. Substitution of trustees. Validity of substitution. *King* v. *Jones*, 319.

§ 2817 (1906). Covenants. Evidence. Warranty against incumbrances includes taxes. Palor evidence inadmissible to show grantee assumed payment of taxes. *Martin* v. *Partee*, 482.

§§ 3283, 4752-56 (Hem.). Commerce. Operation of cotton gin as incident to purchase of cotton seed for interstate shipment not interstate commerce. Monopolies. Attempting to destroy competition in cotton ginning by putting down price not unlawful. *Crescent Cotton Oil Co.* v. *State ex rel.*, 615.

§ 3410 (1906). Municipal Corporations. General ordinances on subject of offenses self-operating. *Cook* v. *City of Pascagoula*, 5.

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CODE CITED AND CONSTRUED—Continued.

§§ 4015, 4016, 4025 (Hem.). Criminal law. Duplicate detention warrant sufficient for detention of convict. *Ex Parte Moody*, 313.

§ 4050 (1906). Railroads. Trial. Instructions on duty to maintain warning sign erroneous under declaration and evidence as to cause of injury. *Hines* v. *McCullers*, 666.

§ 4267, 4740 (1906). Taxation. Insufficiency of evidence to overcome presumption of regularity of assessment. *Robertson* v. *U. S. Nursery Co.*, 14.

§ 4367 (1906). Taxation. Filing list of lands sold at special sale thirty-four days thereafter not "immediately" under the statute. *Fairly* v. *Albritton*, 714.

§ 4434 (Hem.). Courts. Drainage district proceeding in chancery court is a "pending suit" within statute creating new county, Jurisdiction not lost by exclusion of land from chancery court district. *Box* v. *Straight Bayou Drainage Dist.*, 850.

§§ 4523-24 (Hem.). Master and servant. Violation of statute limiting working hours gave no right to action to injured employee not working about machinery. *Handy* v. *Mercantile Lumber Co.*, 489.

§ 4525 (1906). Schools and school districts. Trustees of separate school district have management of superintendent elected by them. *Lander* v. *Tolbert*, 592.

§§ 5968-74 (Hem.). Municipal corporations. Statute authorizing city to issue bonds for hospital not unconstitutional. *Feemste* v. *City of Tupelo*, 733.

COMMERCE.

1. *Right and liabilities as to interstate telegram covered by federal law.*

   A telegram sent from a point in one state to a point in another state is interstate commerce and in such case the right and liabilities in connection therewith depend upon the acts of congress, the contract contained on the telegraph blank, and the common-law principles accepted and enforced by the federal court. *W. U. Tel. Co.* v. *Norman*, 128.

2. *Interstate telegrams governed as to punitive damages by federal law.*

   A telegram offered for transmission from a point in this sttae to a point in another state was an interstate message and governed as to the recovery of punitive damages by federal law. *Postal Telegraph-Cable Co.* v. *Eubanks*, 530.

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COMMERCE—CONSTITUTIONAL LAW.

COMMERCE—Continued.

3. *Act of telegraph company's agent in refusing to take interstate message. An interstate transaction governed by federal law.*

Where plaintiff went to defendant telegraph company's agent and stated that he wanted the agent to deliver a message to a point in another state, which the agent refused to do, the act of the agent was not wholly disconnected with interstate commerce, but was so intimately related to the proposed message, interstate in character, that his refusal to receive it was the act of an interstate agent in violation of a federal duty with reference to an interstate matter, and therefore controlled by the federal law as to the telegraph company's liability for punitive damages. *Telegraph-Cable Co.* v. *Eubanks*, 530.

4. *Operation of cotton gin as incident to purchase of cotton seed for interstate shipment not interstate commerce.*

Where a cotton oil mill operated a gin as an incident of its purchase of cotton seed for shipment to its oil mill in another state, and to enable it to purchase the seed more advantageously, in such case the ginning was a separate and distinct transaction from its purchase or shipment and was not interstate commerce and Laws 1914, chapter 162 (Hemingway's Code, sections 4752-4756), prohibiting corporations manufacturing cotton seed oil products from operating cotton gins except in the town where their cotton oil plant is located, is not invalid as a burden and interference with interstate commerce. *Crescent Cotton Oil Co.* v. *State ex rel.*, 615.

CONSTITUTION CITED AND CONSTRUED.

§§ 80, 87 (1890). Municipal corporations. Statute authorizing city to issue bonds for hospital not unconstitutional. Statute. Act authorizing city bond issue to construct hospital not special or local. *Feemste* v. *City of Tupelo*, 733.

CONSTITUTIONAL LAW.

1. *Municipal corporations. Ordinance imposing penalty greater than provided by state law.*

A provision in a municipal ordinance providing that all offenses against the state penal laws amounting to a misdemeanor shall be offenses against the municipality when committed within the corporate limits, and further providing that any person violating such ordinance shall, upon conviction, be fined not less than one dollar or more than one hundred dollars, or imprisoned in jail not to exceed one year or both, is void as undertaking to

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CONSTITUTIONAL LAW—CONTRACTS.

CONSTITUTIONAL LAW—Continued.

impose a penalty which in some cases would be in excess of the penalty provided by the state laws for the same offense. *Cook v. City of Pascagoula*, 5.

2. *Same.*

But such excessive penalty so provided will not invalidate the whole ordinance, since section 3419, Code 1906, provides the penalty to be imposed for violation of city ordinances. *Ib.*

3. *Contributory negligence rule may be changed by statute.*

Contributory negligence as a defense in an action for a tort is grounded on the common-law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified or abolished by statute. *Hines v. McCullers*, 666.

4. *Statute. Act authorizing city bond issue to construct hospital not special or local.*

Laws 1918, chapter 290, authorizing the city of Tupelo to issue bonds for not more than $50,000 for the construction and equipment of a hospital is not violative of Constitution 1890, section 87, prohibiting any special or local law for the benefit of individuals or corporations is cases providable for by general law, particularly in view of section 89; the prohibition against special or local legislation applying, not to municipal, but to private corporations defined by the Constitution 1890, section 189. *Feemste v. City of Tupelo*, 733.

5. *Taxation. Legislature may bestow power to equalize assessment as it may see fit.*

The power to equalize assessments given both the board of supervisors and the state tax commission are purely statutory. No constitutional privilege to equalize assessments is conferred upon the board of supervisors by the constitution; neither is any such power conferred upon the state tax commission. It therefore rests entirely with the legislature to bestow so much or so little of this power as it may see fit upon either board. *Taylor et al. v. State ex rel.*, 771.

CONTRACTS.

1. *Electricity. Contract for payment of arrearages. Void.*

A provision in a contract between an electric light company and a customer by which the customer is required to pay before installation of service, a previously contracted bill for services at another location, is without consideration and void. *Meridian Light & Ry. Co. v. Steele*, 114.

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CONTRACTS.

CONTRACTS—Continued.

2. *Specific performance. Correspondence contract which does not describe land is insufficient.*

Where the contract for the sale of land which consisted of correspondence between the parties only described the lands as vendor's land in a certain section and so far as vendor's letters were concerned only as her one hundred and sixty acres in a certain county, there was no sufficient certainty in the description to entitle the purchaser to specific performance. *Philp* v. *Dana*, 697.

3. *Specific performance. Acceptance of offer not specifying details and requiring acts not in offer is insufficient.*

Where the previous correspondence between the parties had not specified all of the terms for the sale of land, even the purchaser's name not being mentioned, and the final acceptance required the vendor to send the deed to a bank where the purchaser resided to deliver on the payment of the money and delivery of the notes, the contract cannot be specifically enforced. *Ib.*

4. *Same.*

Before specific performance will be decreed, the tender of performance on the part of the buyer, that is to say, the payment of the money and the delivery of the notes, must be made to the other party at her place of business or residence. *Ib.*

5. *Attorney entitled to retainer though some services performed on Sunday.*

Where an attorney made a retainer contract with his client on a secular day and stayed in town for ten days at the request of his client, neglecting to attend to other matters waiting to close up the business of his client, he was entitled to recover a reasonable fee as a retainer and a reasonable amount for his time in remaining in town instead of leaving to attend to other matters, though some of the services rendered were performed on Sunday in violation of section 1366, Code 1906 (Hemingway's Code section 1102), such a contract not being an indivisible one. *Jones* v. *Brantley*, 721.

6. *Sunday. Services of attorney in rearranging partnership business not work of necessity or charity.*

Services rendered by an attorney in rearranging a partnership business is not a work of necessity or charity under Code 1906, section 1366 (Hemingway's Code section 1102) prohibiting the performance of work on Sunday except housework or other work of necessity or charity. *Ib.*

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CONTRACTS—CORPORATIONS.

CONTRACTS—Continued.

7. *Sunday. Certain legal services may be performed on Sunday.*

There are some services that an attorney may lawfully perform on Sunday, as the law expressly authorizes certain suits and other legal matters to be done on Sunday and where his contract is not an indivisible one the performance of work on Sunday prohibited by law does not vitiate the entire contract. *Ib.*

See LANDLORD AND TENANT.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

1. *Taxation. Back taxes on capital stock invested in property taxed valid.*

The mere fact that all the capital stock of a corporation operating a plantation and nursery has been invested in real and personal property which has been assessed and subjected to taxation constitutes no bar to back assessment upon any portion of its capital stock, where the corporation has neither been assessed upon capital stock *eo nomine*, nor paid taxes upon the value of its capital stock as such. *Robertson* v. *U. S. Nursery Co.*, 14

2. *Taxes. Deduction of assessed value in back. Assessing capital stock.*

In a proceeding to back assess the capital stock or a corporation the total assessed value of its real and personal property should be deducted from the value of its stock. *Ib.*

3. *Banks and banking. In suit by minitory stockholders against directors for losses resulting from their negligence directors cannot plead invalidity of charter.*

Where it is shown incorporators apply for and obtain a charter incorporating a bank under a law that is valid, issue stock in due course, elect officers and a board of directors, and actually conduct business in the corporate name, the chosen directors, who accept the position and assume to discharge the duties of their office, cannot in a suit in equity against them by minority stockholders plead that because the charter of the bank is invalid they are not directors of a corporation. *Boyd et al.* v. *Applewhite et al.*, 879.

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COTTON GIN—COVENANTS.

COTTON GIN.

1. *Commerce. Operation of cotton gin as incident to purchase of cotton seed for interstate shipment not interstate commerce.*

Where a cotton oil mill operated a gin as an incident of its purchase of cotton seed for shipment to its oil mill in another state, and to enable it to purchase the seed more advantageously, in such case the ginning was a separate and distinct transaction from its purchase or shipment and was not interstate commerce; and Laws 1914, chapter 162 (Hemingway's Code, sections 4752-4756), prohibiting corporations manufacturing cotton seed oil products from operating cotton gins except in the town where their cotton oil plant is located, is not invalid as a burden and interference with interstate commerce. *Crescent Cotton Oil Co.* v. *State ex rel.*, 615.

2. *Monopolies. Attempting to destroy competition in cotton ginning by putting down price not unlawful.*

An attempt to destroy competition by putting down the price of ginning cotton below its actual cost does not violate subdivisions (M), (N), or (O), of the anti-trust Laws 1908, chapter 119. (Hemingway's Code section 3283), as to destroying competition in the manufacturing or sale of commodities. *Ib.*

COURTS.

1. *Drainage district proceeding in chancery court is a "pending suit" within statute creating new county.*

Under section 13, chapter 348, Laws 1918, creating Humphreys county, proceedings for the establishment and maintenance of a drainage district instituted in the chancery court of Yazoo county, under chapter 269, Laws 1914 (section 4434 et seq., Hemingway's Code), are judical and a pending suit." *Box* v. *Straight Bayou Drainage Dist.*, 850.

2. *Jurisdiction not lost by exclusion of land from chancery court district.*

The chancery court obtaining jurisdiction of a drainage district under Laws 1914, chapter 269 (section 4434 et seq., Hemingway's Code), does not lose its jurisdiction because the land embraced in the drainage district is subsequently placed in another county in a different chancery court district. *Ib.*

COVENANTS.

See LAND AND LAND TITLES.

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CRIMINAL LAW.

1. *Necessity of stating defense in application to withdraw plea of guilty.*

Where, in a criminal case, a plea of guilty is entered and is afterward sought to be set aside, the applicant should at least state the substance of his defense, so that the court may judge of the merits. *Turner* v. *State*, 68.

2. *Trial court's statement accepted as true on appeal, as against ex parte affidavits.*

The trial judge's statement on appeal must be accepted as true as against a mere *ex parte* affidavit, especially where the statements made by the judge are not directly contradicted. *Ib.*

3. *Refusal to permit withdrawal of plea of guilty sustained.*

Where in a criminal case a defendant entered a plea of guilty and afterwards sought to withdraw such plea, stating in his application to withdraw that the plea of guilty was made through ignorance, but did not set forth the facts alleged to constitute a defense, and the trial court stated in the record that accused had made a full statement regarding the offense charged when the plea of guilty was entered which statement of facts was no defense. In such case there was no abuse of discretion in denying the application. *Ib.*

4. *Petition for writ of error coram nobis taken as true on demurrer.*

A demurrer to a petition for a writ of error *coram nobis* admits all facts well stated or pleaded in the petition. *Hawie* v. *State*, 197

5. *Insane persons. Not to be arraigned for crime.*

If a man in his sound memory commits a capital offense and before arraignment becomes mad he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. *Ib.*

6. *Insane person. Not to be tried for crime.*

If after a prisoner has pleaded he becomes mad, he cannot be tried, for he cannot make his defense. *Ib.*

7. *Same.*

If after one charged with a felony has been tried and found guilty, he loses his senses before judgment, judgment should not be pronounced. *Ib.*

8. *Same.*

If after one charged with a felony has been tried, convicted and sentenced, he becomes insane, execution should be stayed. *Ib.*

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CRIMINAL LAW.

CRIMINAL LAW—Continued.

9. *No appeal by one convicted while unknown to be insane.*
Where an accused was arraigned, tried and convicted while insane, such insanity being unknown to the court he has no remedy by appeal. *Hawie* v. *State*, 197.

10. *Writ of coram nobis recognized.*
A writ in the nature of the writ of *coram nobis* has always been recognized in this state as a common-law remedy in appropriate cases. *Ib.*

11. *Writ of coram nobis.*
A writ in the nature of a writ of *coram nobis* is applicable to criminal as well as civil proceedings. It is founded upon the inherent power of the court over its judgments and proceedings. *Ib.*

12. *Writ of coram nobis applies to reverse conviction of one insane at trial.*
A circuit court judge has power, after the expiration of a term, to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case, where it appears that the defendant was insane at the time of the trial, and the fact was not made known at the trial, and upon the assignment of such error in fact if disputed by the state, to cause a jury to be impaneled in term to try such issue; and the venue for the trial of such issue may be changed to another court but the change carries the whole case. *Ib.*

13. *Granting of instruction during argument.*
It was error for the court to grant an instruction for the state during the argument of counsel for the defense to the jury, where he did not know of the granting of such instruction and had no opportunity to refer to the same in his argument. *King* v. *State*, 230.

14. *Duplicate detention warrant suwcient for detention of convict.*
Under Hemingway's Code, sections 4015, 4016, 4025, Laws 1908, chapter 109, relating to detention of convicts, a duplicate detention warrant issued by the sheriff to a county convict manager after the original detention warrant had been sent out of the state at the time the convict escaped and was not returned, was sufficient authority for the convict's detention, where the duplicate was an exact copy of the original. *Ex Parte Moody*. 313.

15. *Same.*
If a detention warrant is lost or accidentally destroyed, a duplicate can be issued. *Ib.*

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CRIMINAL LAW.

CRIMINAL LAW—Continued.

16. *The period while a convict is at large will not be included in calculating the expiration of his sentence.*

Even though two years be the limit for which a convict may be held, he is not entitled to have the time which elapsed during his period of escape counted in the making of a two year period. *Ib.*

17. *Where guilt of defendant manifest improper remarks of district attorney not reversible error.*

Where on trial for murder the guilt of the defendant was manifest from the evidence and the jury under their oaths could not have arrived at any other verdict than that of guilty, it was not reversible error for the district attorney in his argument to comment on the fact that the defendant did not testify, though such comment was in violation of Code 1906, section 1918 (Hemingway's Code, section 1578) forbidding comment. *House* v. *State*, 436.

18. *Bail. Amount reduced where defendant poor and in ill health.*

Where a defendant charged with crime was required to give an excessive bond, the supreme court on appeal in a *habeas-corpus* proceeding will reduce the amount of the bond where it appears that on account of his poverty the defendant will otherwise be denied bail and where his physical condition is such that his health may be endangered by confinement. *Ex Parte Goldsby*, 479.

19. *On affirming a conviction for murder court will not fix date for execution, where writ of coram nobis is pending.*

On affirming a conviction for murder with the death penalty, the supreme court will not fix a date for the execution, where it has previously reversed a judgment sustaining a demurrer to a petition for a writ of error *coram nobis*, but will remand the case to the trial court in order that the circuit court may have the whole case before it and at the proper time fix the date of execution, or take such action in the case as shall conform to the views expressed by the court in the consideration of the petition to vacate the judgment and grant the defendant a new trial. *Howe* v. *State*, 508.

20. In this case there was a motion to set aside a former judgment of reversal, and determine the case on its merits; the former judgment was set aside, and the judgment affirmed. *Conner* v. *State*, 539.

21. *Prosecution for having obtained food and lodging with intent to defraud barred in four years.*

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CRIMINAL LAW.

CRIMINAL LAW—Continued.

Where the offense of obtaining food and lodging with intent to defraud was committed in the year 1915, and the prosecution was not commenced until the year 1918, the accused being within the jurisdiction of the court, not hiding, nor absconding, nor fleeing from justice, such a prosecution was barred by limitation. *Steele* v. *State*, 546.

22. *Competency of evidence not objected to will not be reviewed.*
The supreme court will not pass upon the competency of evidence introduced in the lower court without objection. *Davenport* v. *State*, 548.

23. *Improper instructions shown to have influenced verdict of jury.*
Testimony of jurors on motion for new trial, not objected to, is held by the court in this case to have influenced the verdict of the jury. *Ib.*

24. *Giving of unrequested instructions.*
Under section 793, Code 1906 (Hemingway's Code, section 577) so providing, the trial judge is forbidden to give an instruction not requested by either party. *Ib.*

25. *Giving of instruction after argument has began.*
It is error for the trial judge to give an instruction after the argument to the jury has begun. *Ib.*

26. *Burglary. Not necessary for indictment that intent to commit larceny was burglarious.*
An indictment for burglary charging that defendant did unlawfully, willfully and feloniously and burglariously break and enter a certain dwelling was sufficient; it was not necessary to further use the word "burglarious" in charging an intent to commit larceny; the word having reference to the manner of entry and characterizing the breaking and entry as having been done in the manner of a burglar. *Carothers* v. *State*, 762.

27. *Confessions made to an officer without caution or warning admissible in evidence.*
Confessions of an accused made to an officer having him in custody were not incompetent because the officer failed to caution the prisoner that his statement might be used against him, there being no statute requiring such caution or warning. *Ib.*

28. *Erroneous statement of law in argument not prejudicial not included in instructions.*
A statement by a prosecuting attorney in his closing argument in a prosecution for burglary that "possession of recent stolen goods is prima-facie evidence of guilt, and that I could obtain an

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CRIMINAL LAW—Continued.

instruction from the court to that effect," although a misstatement of the law, was not prejudicial to the accused; the error complained of not appearing in any instruction of the court. *Carothers* v. *State*, 762.

29. *Use in argument as substantive proof of impeaching hearsay testimony was error.*

It was error to permit prosecuting counsel in argument to use as substantive proof the impeaching or discrediting testimony of a rebutting witness as to a material statement made out of court, in the absence of the accused, by another witness; such testimony, being hearsay, was admissible only for the purpose of impeachment of the credibility of the witness. *Darby* v. *State*, 869.

30. *Witnesses. Contradiction of statement out of court proper; timeliness of objection to improper argument.*

Testimony contradicting a material statement made out of court by defendant's witness was admissible to impeach his credibility, and need not be objected to when offered, but objection and exception to its wrongful use in argument was timely when made during the argument; and, objection to its wrongful use is not waived because it was not objected to when offered, or for failure to request an instruction as to its use and purpose. *Ib.*

31. *Improper prejudicial argument reversible error.*

Where it clearly appears that improper argument in the trial substantially prejudiced the rights of the other party, reversal for such error will follow. *Ib.*

DAMAGES.

1. *Telegraphs and telephones. Punitive damages not allowed where the act is neither authorized nor ratified.*

Neither under the rule of the federal court nor the rule in the state of Louisiana is the master liable in punitive damages because of a wrong commited by servant, unless the master either authorized or ratified its commission. *Postal Telegraph Cable Co.* v. *Green.* 260.

2. *Intoxicating liquors. Damages allowed for mental suffering caused by illegal search and seizure.*

Where plaintiff when alighting from a train, intrusted her suit case to a transfer man and just after alighting, the marshal searched the suit case for alcholic liquors supposed to belong to the transfer man over his protest and without a search-warrant, in such case the defendant marshal was violating Constitution 1890, section 23, relating to unreasonable search and seizure and

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DAMAGES—Continued.

since he was presumed to know the law, his act was a willful wrong and mental suffering was a proper element of damages. *U. S. Fid. & Guar. Co.* v. *State ex rel.*, 369.

3. *Amount.*

For an injury causing a double hernia, permanent unless relieved by a dangerous operation which might not be successful, and causing pain at intervals and compelling plaintiff to wear a truss and materially reducing his capacity for work, a verdict by the jury for $15000 was not excessive. Y. & M. V. R. R. Co. v. *Dees*, 438.

4. *Telegraphs and telephones. Punitive damages not recoverable for agent's wilful refusal to accept message unless wrong was authorized or ratified.*

Under the federal rule no recovery of punitive damages can be had on account of the wilful conduct of the servant, unless the commission of the wrong was authorized by the master, participated in by him, or ratified by him. *Postal Telegraph-Cable Co.* v. *Eubanks*, 530.

DEBT.

See Executors and Administrators.

DEBTOR AND CREDITOR.

See BULK SALES LAW.

DEED OF TRUST.

See MORTGAGES.

DEEDS.

1. *Conveyance to wife alone despite warranty to her children.*

The court held in this case that the deed set out in its opinion was a conveyance to the wife alone, and not to her and the grantor's children, despite the convenant of warranty in the deed to defend title to her "and my children" such words of warranty not being words of grant. *Raley* v. 555.

2. *Delivery necessary to pass title.*

In a suit by a father to cancel a deed of gift to his son, it was incumbent on the son to show that the deed had been delivered to him before he could succeed in the litigation. *Lynch* v. *Lynch*, 752.

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DEEDS—ELECTRICITY.

DEEDS—Continued.

3. *Presumption of delivery from record disappears on showing no delivery.*
The presumption of delivery of a deed arising from lodging it for record disappears on a showing that the deed in fact was never delivered and that it has been in the grantor's possession ever since it was signed and acknowledged, except when in the possession of the clerk of the chancery court for record. *Ib.*

4. *Intention to deliver does not dispense with manual delivery.*
An intention to deliver a deed does not dispense with delivery, there must be an act showing a delivery. *Ib.*

DRAINAGE.

1. *Legislature to provide for establishment.*
It is the province of the legislature to provide for the establishment of drainage districts and the authority, as well as the procedure, for the creation of the drainage district, is governed by the statute. *Equen* v. *Arterbury*, 76.

2. *Concurrent jurisdiction of courts in either of two counties to establish.*
Under Laws 1914, chapter 269, section 1, providing that if land in more than one county is embraced in a proposed drainage district, the application should be made to the chancery court of either county, and all proceedings should be had in such chancery court, does not withdraw jurisdiction to establish such a drainage district from a chancery court because proceedings had originally been instituted in the court of another county. Ib.

3. *Dismissal of petition not res judicata.*
The action of a chancery court in dismissing a drainage petition does not render the matter *res adjudicata* so as to preclude favorable action by the chancery court of another county on substantially the same petition, especially since Laws 1912, ch. 269, section 4, provides that engineers' reports, surveys, etc., in the first proceeding shall be paid for as part of the cost in a subsequent proceeding. *Ib.*

ELECTRICITY.

1. *Contract for payment of arrearages. Void.*
A provision in a contract between an electric light company and a customer by which the customer is required to pay before installation of service, a previously contracted bill for services at another location, is without consideration and void. *Meridian Light & Ry. Co.* v. *Steele*, 114.

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ELECTRICITY—EQUITY.

ELECTRICITY—Continued.

2. *Electric light company liable for damages for delay in furnishing service.*
An electric light company is liable for actual damages for its delay in furnishing service to a customer because the customer refused to pay for arrearage on account of service at a former residence. *Light & Ry. Co.* v. *Steele*, 114.

EQUITY.

1. *Remedy at law after alteration of one of joint signatures.*
The holder and lender on a note, signed by a drug company through its president, and by an individual, had an adequate remedy at law on the note as signed and delivered to him by the president of the company, even though the individual signer could defeat recovery, because he had signed the note jointly with the president of the drug company as an individual only, while the president had written in both his signature, the name of the drug company and after the name the abbreviation "pres." this fact not affording the holder a remedy in equity, against the individual signer. *Foote* v. *Dickson*, 186.

2. *Appeal and error. Whether cross-bill presents matter of common-law or equity jurisdiction will not be first considered on appeal.*
The question as to whether a cross-bill presented matter purely of common-law jurisdiction and not equity jurisdiction cannot arise on appeal to the supreme court where no such objection was raised in the court below. *Schaff* v. *Kahn & Bernstein*, 412.

3. *Cross-bill based on mistake in delivery of shipment of mules by carrier was germane to issue by carrier to recover value of shipment erroneously delivered.*
In a suit by a carrier to recover the value of a carload of mules delivered to defendants by mistake instead of another shipment intended for them, but delivered to a third party, a cross-bill in equity based on freight paid, expenses of feeding and handling, and damages to the second shipment, could be maintained; the two demands growing out of one transaction and being vitally related, so that the issues presented by the cross-bill were germane to the issues made by the original bill, particularly in view of the fact that if defendants could not maintain their cross-bill they would be forced to go to a foreign jurisdiction to prosecute their cross-action. *Ib.*

4. *Relief not supported by pleadings, ground for reversal.*
The supreme court on appeal will reverse a decree of the lower court where the relief granted was not specifically prayed for

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EQUITY—Continued.

and should not have been granted under the general prayer, for the reason that it was not supported by any allegation in the bill of complaint. *Rutland* v. *McIntosh*, 437.

5. *Chancellor's action in appointing master to state relatively simple account will not be reversed.*

In a suit to have a deed absolute on its face declared a mortgage and cancelled though the accounts presented do not appear to be complicated or difficult of accurate ascertainment, the chancellor's action after holding with the complainant, in appointing a master to make and state on account will not be reversed. *Blackledge* v. *Spikes*, 546.

ESTOPPEL.

1. *Giving agent apparent title to property not to be urged by purchaser with knowledge.*

The rule that equity will not relieve the principal who has voluntarily placed the title to his land in his agent, where another must suffer by reason of such fraudulent act does not apply where the purchaser had knowledge of all the facts or sufficient facts which, if followed up, would place him in possession of all the facts as to the real ownership of land. *Biles* v. *Walker*, 98.

2. *That purchaser took land in name of agent in order to sell more readily for better price not in itself fraudulent.*

The fact that a real estate agent took the title to purchased land in the name of his agent solely for the reason that he could more readily sell the property, or sell it at a better price than if in his own name, was not in itself unlawful, or fraudulent. *Ib.*

See BANKS AND BANKING.

EVIDENCE.

1. *Insurance. Evidence sufficient to establish death by freezing.*

Where the evidence showed that insured went hunting and was found next morning lying on his back with a part of one leg in a marshy hole and his body frozen, these facts did not warrant the jury in finding that his death was proximately caused by getting his foot caught, but only established that his death was caused by freezing and he was only entitled to recover one eighth the usual amount under a policy so providing. *Continental Cas. Co.* v. *Hardenbergh*, 1.

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EVIDENCE.

EVIDENCE—Continued.

2. *Seduction. Promise, of marriage. Evidence of previous chaste character.*

In order to sustain a conviction for seduction under Code 1906, section 1081 (Hemingway's Code, section 808), under promises of marriage, the jury must believe that there was a promise of marriage made by the defendant to the prosecutrix, and that this caused her to yield her person to him, and they must further believe that at this time the prosecutrix was of previous chaste character. *King* v. *State*, 230.

3. *Seduction. Burden of proof on state.*

In a prosecution for seduction under promise of marriage the burden of proof is upon the state to establish the three essential ingredients of the crime. *Ib.*

4. *Seduction. Previous chastity. Proof of reputation.*

In a prosecution for seduction, it is competent for the state to prove the general reputation of the prosecutrix for chastity as one of the elements of proof of actual chastity. *Ib.*

5. *Seduction. Evidence of declarations of prosecutix in travail.*

In a prosecution for seduction, it was error to permit the mother of the prosecutrix to testify over objection that the prosecutrix stated while in travail that accused was the father of the child, where it was not contended that the prosecutrix became pregnant as the result of the first act of intercourse, but that her pregnancy was caused several weeks later, though such testimony would be admissible in a bastardy proceeding. *Ib.*

6. *Railroads. Evidence making origin of fire question for the jury.*

Where in a suit to recover damages against a railroad company for damages for the loss of a warehouse by fire, the evidence, by a process of exclusion of all other probable causes of the fire, together with evidence tending to show with a reasonable degree of certainty, that the sparks issuing from an antiquated locomotive of defendant set fire to the building, in such case the question of the origin of the fire should be submitted to the jury under the instructions of the court. *L., L. & G. Ins. Co.* v. *K. & S. E. R. Co.*, 258.

7. *Physicians and surgeons. Admissibility.*

Where in a suit against a physician and surgeon for negligence in performing an operation, the declaration expressly charged that the defendant with want of skill and care thereby putting his possession thereof directly in issue, the testimony of other surgeons that defendant was a careful and skillful surgeon was admissible. *Shaw* v. *Klein*, 411.

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EVIDENCE.

EVIDENCE—Continued.

8. *Appeal and error. Stenographer's notes not filed persuant to notice given within thirty days after adjournment of term will be stricken from record.*

Under Laws 1910, chapter 111, par. (D) Hemingway's Code, section 585, so providing, notice to the stenographer to file his notes of oral evidence taken at a trial must be given within thirty days of the adjournment of the term of court at which the trial was had and where the appellant did not give such notice until thirty-five days had elasped after the adjournment of the term, such evidence on appeal will, on motion, be stricken from the record, though not claimed to be incorrect in any particular. *White* v. *Board of Supvrs*, 434.

9. *Books of railroad company.*

In a suit against a railroad company for cotton destroyed by fire while in its possession as carrier, it was error to exclude the books of the railroad company which tended to show that the cotton was delivered before the fire to a compress company according to custom and a bill of lading which constituted the compress company the agent of the shipper to receive shipment. *Ill. Cent. R. Co.* v. *Threefoot Bros. & Co.*, 468.

10. *Criminal law. Competency of evidence not objected to will not be reviewed.*

The supreme court will not pass upon the competency of evidence introduced in the lower court without objection. *Davenport* v. *State*, 548.

11. *Criminal law. Improper instructions shown to have influenced verdict of jury.*

Testimony of jurors on motion for new trial, not objected to, is held by the court in this case to have influenced the verdict of the jury. *Ib.*

12. *Court judicially knows that there is a principal for each school but only one superintendent in district.*

It is a matter of common knowledge that in a number of separate municipal school districts composed of the larger cities and towns of the state, there are a number of separate schools and that in each one of these schools there is a principal, while for all of the schools there is one superintendent. *Lander* v. *Tolbert*, 592.

13. *Railroads. Prima-facie statute does not relieve plaintiff of final burden.*

Laws 1912, chapter 215, (Hemingway's Code, section 1645), making accidents caused by running trains prima facie evidence of negligence, merely places on the railroad company the burden

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EVIDENCE—Continued.

of introducing evidence as to the operation of its trains and showing the circumstances surrounding the infliction of the injury and after such evidence has been introduced, the burden then remains with the plaintiff to establish negligence by a preponderance of the evidence. *Hines* v. *McCullers*, 666.

14. *Criminal law. Confessions made to an officer without caution or warning admissible in evidence.*

Confessions of an accused made to an officer having him in custody were not incompetent because the officer failed to caution the prisoner that his statement might be used against him, there being no statute requiring such caution or warning. *Carothers* v. *State*, 762.

15. *Criminal law. Use in argument as substantive proof of impeaching hearsay testimony was error.*

It was error to permit prosecuting counsel in argument to use as substantive proof the impeaching or discrediting testimony of a rebutting witness as to a material statement made out of court, in the absence of the accused, by another witness; such testimony, being hearsay, was admissible only for the purpose of impeachment of the credibility of the witness. *Darby* v. *State*, 869.

16. *Criminal law. Witnesses. Contradiction of statement out of court proper; timeliness of objection to improper argument.*

Testimony contradicting a material statement made out of court by defendant's witness was admissible to impeach his credibility, and need not be objected to when offered, but objection and exception to its wrongful use in argument was timely when made during the argument; and, objection to its wrongful use is not waived because it was not objected to when offered, or for failure to request an instruction as to its use and purpose. *Ib.*

17. *Banks and banking. Evidence held to sustain chancellor's decree for minority stockholders against directors permitting excessive loans.*

In a suit in equity by stockholders against the directors to recover losses sustained through neglect of duty, misconduct, and negligence of the directors causing the bank to become insolvent and the capital stock valueless; the findings of fact by the chancellor and his decree in complainant's favor cannot be said to be clearly wrong, where there is testimony tending strongly to prove that the paid-in capital stock of the bank was one hundred thousand dollars and that the directors by inattention, by failure to enact by-laws governing the officers, by

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EVIDENCE—HABEAS CORPUS.

EVIDENCE—Continued.

failure to examine the books, papers, and securities of the bank, negligently permitted the president and cashier to lend the individual members of the board of directors the aggregate sum of two hundred and twenty-nine thousand dollars, a part of which is evidenced by large overdrafts, as a result of which the institution was wrecked and the capital stock rendered worthless. *Boyd* v. *Applewhite*, 879.

EXECUTOR AND ADMINISTRATOR.

1. *Instrument assuming debt of servant not invalid for want of consideration.*

A decedent has a perfect right to direct the disposition of his estate, and a written assumption of debt of a servant in consideration of faithful service rendered and "other valuable consideration" supported by affidavit of correctness on filing the instrument as a claim against the estate of the promisor cannot be defeated on the ground of want of consideration. *Brickell* v. *Hendricks*, 356.

2. *Unliquidated claim against negligent bank director is not a claim for probate against his estate.*

Stockholder's unliquidated claim for damages against a negligent bank director, who dies pending litigation, is not a claim for probate against the estate of a deceased person under section 2107, Code of 1906 (section 1775, Hemingway's Code). *Boyd et al.* v. *Applewhite et al.*, 879.

FRAUDULENT CONVEYANCE.

See BULK SALES LAW.

HABEAS CORPUS.

1. *After judgment awarding custody of infant to parents courts cannot require them to permit child to visit grandparents.*

After awarding the custody of a child to the party entitled thereto, the judge in a writ of *habeas corpus* trial is without power to direct the manner in which such party shall exercise his lawful authority over such child or to direct that he shall thereafter surrender, though temporarily, the custody thereof to another party. *Gray et ex.* v. *Gray*, 541.

2. *Same.*

The judge does not merely, because he presided in a *habeas corpus* trial in which the right to the custody of a person was deter-

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HABEAS CORPUS—Continued.

mined, thereby acquire perpetual jurisdiction over the custody and welfare of such person, when the order entered by him either freeing the person from restraint or awarding his custody to the party entitled thereto has been executed, the judge's jurisdiction in the matter is at an end unless and until it is again invoked by the issuance of another writ of *habeas corpus*. *Gray et. ex.* v. *Gray*, 541.

HIGHWAYS.

1. *Road district cannot incur debt unless authorized by electors.*
Under Laws 1918, chapter 209, section 2, forbidding incurring interest bearing debts unless so authorized a road district cannot issue bonds for improvement of roads unless authorized by a majority of the electors voting in an election called for that purpose. *Board of Highway Comm.* v. *Warren*, 295.

2. *A road district is a taxing district within the statute relating to incurring debts.*
Under Laws 1918, chapter 290, section 2, prohibiting the incurring of interest-bearing debts unless authorized by a vote of the majority of electors a road district is a taxing district. *Ib.*

3. *Members of board of supervisors not liable criminally for voting to pay contractor's claim.*
A member of the board of supervisors was not liable criminally for voting to pay the claim of a contractor for working the roads, though he had not worked the roads in accordance with the plans and specifications, where the supervisor did not act fraudulently, corruptly or through bad faith, but under the belief that the board had power to pay the claim at that time, as he was acting judicially. *Pegram* v. *State*, 564.

HOMESTEAD.

Rights of children.
There is no provision in law giving a child an interest such as the wife has in the homestead or other lands of the father. *Rawlings.* v. *Rawlings*, 140.

HOSPITAL.

Private hospital liable for negligent injuries to patients.
A hospital conducted for private gain is liable in damages to patients for injuries resulting from negligence of the nurses and employees, since a patient is generally admitted to such a hospital under either an express or implied obligation, that he shall

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receive such reasonable care and attention for his safety as his mental and physical condition if known may require. *Meridian Sanatorium* v. *Scruggs*, 330.

HUSBAND AND WIFE.

1. *Husband entitled to recover for loss of consortium of injured wife.*
The husband may recover for such injuries as result in loss to him inflicted upon his wife even where the statutes allow the wife to recover for injuries to herself in her own name as our statute does. *Brahan* v. *Meridian Light & Ry. Co.*, 269.

2. *Same.*
The statute allowing a wife to sue for injuries in her own name was not intended to displace the husband as the head of the family nor affect his domestic rights, to the domestic services which the wife renders or would render but for her injuries, nor prevent him from recovering damages *per quod consortium amisit. Ib.*

INDICTMENT AND INFORMATION.

1. *Error to permit amendment of indictment.*
It was error for the court to permit the state to amend an indictment framed under Code 1906, section 1029 (Hemingway's Code, section 754) charging that defendants did unlawfully cohabit together in adultery, by striking therefrom the words "in adultery" the charge of cohabitation "in adultery" being a matter of substance in the indictment. *Kemp* v. *State*, 580.

2. *Burglary. Not necessary for indictment that intent to commit larceny was burglarious.*
An indictment for burglary charging that defendant did unlawfully, willfully and feloniously and burglariously break and enter a certain dwelling was sufficient; it was not necessary to further use the word "burglarious" in charging an intent to commit larceny; the word having reference to the manner of entry and characterizing the breaking and entry as having been done in the manner of a burglar. *Carothers* v. *State*, 762.

INSANE PERSONS.

1. *Common law prevails where insanity is made known at the trial.*
There is no statute in this state which lays down the procedure in cases where it is made known to the court that the defendant is insane at the time he is placed upon trial for a felony, but

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INSANE PERSONS—INSTRUCTIONS.

INSANE PESONS—Continued.

in such case the common law on the subject is clear and must prevaH. *Hawie* v. *State*, 197.

2. *Not to be arraigned for crime.*
If a man in his sound memory commits a capital offense and before arraignment becomes mad he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. *Ib.*

3. *Not to be tried for crime.*
If after a prisoner has pleaded he becomes mad, he cannot be tried, for he cannot make his defense. *Ib.*

4. *Same.*
If after one charged with a felony has been tried and found guilty, he loses his senses before judgment, judgment should not be pronounced. *Ib.*

5. *Same.*
If after one charged with a felony has been tried, convicted and sentenced, he becomes insane, execution should be stayed. *Ib.*

6. *Criminal law. No appeal by one convicted while unknown to be insane.*
Where an accused was arraigned, tried and convicted while insane, such insanity being unknown to the court he has no remedy by appeal. *Ib.*

INSTRUCTIONS.

1. *Seduction. Misleading instruction.*
In a prosecution for seduction it was error to instruct the jury to convict "if they believed that defendant did have intercourse with the prosecutrix at a time she was of previous chaste character at any time within two years prior to the date named in the indictment as charged in the indictment" such an instruction should have stated that such intercourse was had under promise of marriage, or should have used the word "seduce" to make clear that seduction and not intercourse, was the question. *King* v. *State*, 230.

2. *Appeal and error. Harmless error.*
In an action against a private hospital for injuries sustained through negligent treatment, the giving of an instruction that, if plaintiff was injured as a result of the negligence of the employees and nurses of the hospital, as testified by plaintiff's witnesses, the jury should find for the plaintiff, though not technically correct was not reversible error. *Meridian Sanatorium* v. *Scruggs*, 330.

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INSTRUCTIONS——Continued.

3. *Same.*
An instruction should state a hypothesis and the jury should be told that if they believe from the evidence the facts constituting such hypothesis they should find for the plaintiff. *Ib.*

4. *Appeal and error. No reversal because instructions not technically correct.*
The supreme court will not reverse a case because instructions are not happily phrased or because not exactly technically correct, so long as the instructions are not misleading or the inaccuracy complained of could have had no influence in reaching a verdict that could be said to be improper. *Ib.*

5. *Appeal and error. Erroneous instruction on damages harmless where verdict for defendant.*
In an action against a railroad for the death of a mule an instruction on comparative negligence was harmless where the verdict was for the defendant. *Henderson & Mathis* v. *Hines*, 339.

6. *Trial. Refusal of instruction the substance of which has already been given.*
It was not error to refuse an instruction the substance of which had already been given in other instructions. *Y. & M. V. R. R. Co.* v. *Dees*, 438.

7. *Trial. Limit to instructions.*
Trial courts are required and should only grant instructions sufficient in number and character, to guide the jury in determining the issues involved in the case on trial and they have the right to limit the number of instructions to be considered by them accordingly, but this should not be done arbitrarily. *Ib.*

8. *Carriers. Freight. Destruction by fire. Peremptory instruction.*
In a suit against a railroad company for the value of cotton destroyed by fire while in its possession as a carrier; where the evidence tended to show that the cotton had been delivered to a compress company, the shipper's agent to accept delivery, before the cotton was burned, it was error to give a peremptory instruction for the plaintiff, shipper. *Ill. Cent. R. Co.* v. *Threefoot Bros. & Co.*, 468.

9. *Criminal law. Giving of unrequested instructions.*
Under section 793, Code 1906 (Hemingway's Code, section 577) so providing, the trial judge is forbidden to give an instruction not requested by either party. *Davenport* v. *State*, 548.

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INSTRUCTIONS——Continued.

10. *Criminal law. Giving of instruction after argument has begun.* It is error for the trial judge to give an instruction after the argument to the jury has begun. *Davenport* v. *State*. 548.

11. *Trial. Instructions should confine negligence authorizing recovery to negligence alleged.*
Where the declaration alleged negligence in the maintainance of the crossing and the operation of the train, instructions allowing recovery, if the railroad was negligent in any respect that approximately caused the accident were erroneous. *Hines* v. *McCullers*, 666.

12. *Trial. Instructions confining negligence to that alleged does not cure instructions permitting recovery for negligence not contributory to injury.*
Giving a requested instruction to find for defendant unless the jury found it negligent for failing to ring the bell did not cure the error of instructions permitting recovery for any negligence contributing to the injury, especially those permitting recovery for acts of negligence, which the evidence showed did not contribute to the accident. *Ib.*

See NEGLIGENCE; TRIALS.

INSURANCE.

1. *Validity of clause restricting recovery.*
A clause in an insurance policy providing that where the accidental injury causing the loss, or the loss itself results from freezing by the insured while not engaged in his occupation, the recovery shall be limited to one-eighth the usual amount, is valid. *Continental Cas. Co.* v. *Hardenbergh*, v.

2. *Evidence sufficient to establish death by freezing.*
Where the evidence showed that insured went hunting and was found next morning lying on his back with a part of one leg in a marshy hole and his body frozen, these facts did not warrant the jury in finding that his death was proximately caused by getting his foot caught, but only established that his death was caused by freezing and he was only entitled to recover one-eighth the usual amount under a policy so providing. *Ib.*

3. *Loss of oil barge not covered by marine policy against "perils of the sea."*
Where an oil barge while being towed in smooth waters within thirty minutes after starting on the voyage broke under the weight of her own cargo, necessitating stranding, on account

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INSURANCE—Continued.

of initial defective construction, though it had been repaired by the insurer after a previous storm, was not covered by a policy against perils of the sea, barratry, etc., the loss in such case not being proximately caused by a "peril of the sea." *Gulf Transp. Co.* v. *Fireman's Fund Ins. Co.*, 655.

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

Damages allowed for mental suffering caused by illegal search and seizure.

Where plaintiff when alighting from a train, intrusted her suit case to a transfer man and just after alighting, the city marshal searched the suit case for alcoholic liquors supposed to belong to the transfer man over his protest and without a search-warrant, in such case the defendant marshal was violating Constitution 1890, section 23, relating to unreasonable search and seizure and since he was presumed to know the law, his act was a willful wrong and mental suffering was a proper element of damages. *U. S. Fid. & Guar. Co.* v. *State ex rel.*, 369.

JUDGES.

1. *Relation to attorneys does not disqualify, when.*

Under Code, section 165 and Code 1906, section 995. (Hemingway's Code, section 715) as to a judge not presiding where he is related to either party, a "party to an action or suit" being one who is directly interested in the subject-matter in issue; where the attorney employed by the defendant on a contingent basis was a first cousin of the chancellor this did not disqualify the chancellor from trying the case. *Norwich Union Fire Ins. Co.* v. *Standard Drug Co.*, 510.

2. *Same.*

It is relationship to the parties, or either of them to the suit that disqualifies a judge, and not his relationship to an attorney in the case. *Ib.*

JUDGMENT.

See JURISDICTION.

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JURISDICTION.

1. *Drains. Concurrent jurisdiction of courts in either of two counties to establish.*

Under Laws 1914, chapter 269, section 1, providing that if land in more than one county is embraced in a proposed drainage district, the application should be made to the chancery court of either county, and all proceedings should be had in such chancery court, does not withdraw jurisdiction to establish such a drainage district from a chancery court because proceedings had originally been instituted in the court of another county. *Equen* v. *Arterbury*, 76.

2. *Venue. Joint action may be brought where either defendant resides.*

Under Code 1906, section 707, as amended by Laws 1908, chapter 166, and Laws 1919, chapter 149, requiring civil action to be brought in the county in which the defendant or any of them may be found, but providing that a resident sued out of the county of his residence may have the venue changed, a joint action may be commenced in the county in which either of the defendants reside, and service on a defendant residing in another county is valid and binding. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

3. *Justice of the peace. Defective certification of record not cured or waived.*

Where a justice of the peace has failed to certify his record as required by section 84, Code 1906 (Hemingway's Code, section 64), the circuit court is without jurisdiction to try the case or render judgment therein and such defect may not be cured or waived, and where the justice makes an amendment or proper certificate after judgment, the same cannot relate back to give validity to the prior judgment, although after a proper certificate has been made the court has jurisdiction and may then proceed to try the case again. *Xydias* v. *Pellman*, 400.

4. *Courts. Jurisdiction not lost by exclusion of land from chancery court district.*

The chancery court obtaining jurisdiction of a drainage district under Laws 1914, chapter 269 (section 4434 et seq., Hemingway's Code), does not lose its jurisdiction because the land embraced in the drainage district is subsequently placed in another county in a different chancery court district. *Box* v. *Straight Bayou Drainage Dist.*, 850.

See EQUITY.

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JURISDICTION—JUSTICE OF THE PEACE.

JURY.

Statute making negligence and contributory negligence jury questions has no application in equity case.

Chapter 135, Laws of 1910 (section 503, Hemingway's Code), providing "all questions of negligence and contributory negligence shall be for the jury to determine," has no controlling application in an equity case. *Boyd et al.* v. *Applewhite et al.*, 879.

JUSTICE OF THE PEACE.

1. *Service of summons by deputy of regular constable insufficient.*

Where in a suit before a justice of the peace, it appeared that the summons for the defendant was not executed by the constable, but by the person claiming to act as the constable's deputy and the record contained no evidence of the appointment of such person either as a deputy constable or as a special constable, the service was unauthorized; the presumption that such person was a special constable appointed by the justice under Code 1906, section 2732 (Hemingway's Code, section 2231), not being tenable, since the return of service, clearly showed that the person serving the summons did not claim to be acting as a special constable, but as a deputy of the regular constable. *Postal Telegraph-Cable Co.* v. *Thompson*, 379.

2. *Defective certification of record not cured or waived.*

Where a justice of the peace has failed to certify his record as required by section 84, Code 1906 (Hemingway's Code, section 64), the circuit court is without jurisdiction to try the case or render judgment therein and such defect may not be cured or waived, and where the justice makes an amendment or proper certificate after judgment, the same cannot relate back to give validity to the prior judgment, although after a proper certificate has been made the court has jurisdiction and may then proceed to try the case again. *Xydias* v. *Pellman*, 400.

3. *Refusal of circuit court on appeal to allow amendment by inserting names of partners held reversible error.*

Under section 66, Hemingway's Code (Code 1906, section 86), providing that on appeals from justice of the peace the cause shall be tried *de novo*, and under section 558, Hemingway's Code (section 775, Code 1906), providing that the court shall have full power to allow all amendments to pleadings or proceedings at any time before verdict so as to bring the merits to trial, etc., a suit brought in a partnership name may be amended in the circuit court by inserting the names of the partners, and the refusal of the circuit court to allow such amendment on application therefor is reversible error. *McCullar & Co.* v. *Mink*, 829.

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JUSTICE OF THE PEACE—LAWS CITED AND CONSTRUED.

LAND AND LAND TITLES.

1. *Covenants. Evidence. Warranty against incumbrances includes taxes. Parol evidence inadmissible to show grantee assumed payment of taxes.*

Under Code 1906, section 2817 (Hemingway's Code, section 2318) so providing the word "warranty" in a conveyance embraces all five covenants known to the common law and a warranty against incumbrances, except a described mortgage includes a warranty against a lien for taxes for the current year. And parol evidence is inadmissible to show that the grantee agreed to pay the taxes as a part of the consideration since to allow this would be to import a new element into the contract and would contradict the express language of the deed itself by excluding the taxes for that year from the convenant against incumbrances therein contained. *Martin* v. *Partee*, 482.

2. *Deeds. Delivery neccssary to pass title.*

In a suit by a father to cancel a deed of gift to his son, it was incumbrances, except a described mortgage includes a warranty to him before he could succeed in the litigation. *Lynch* v. *Lynch*, 752.

3. *Deeds. Presumption of delivery from record disappears on showing no delivery.*

The presumption of delivery of a deed arising from lodging it for record disappears on a showing that the deed in fact was never delivered and that it has been in the grantor's possession ever since it was signed and acknowledged, except when in the possession of the clerk of the chancery court for record. *Ib.*

4. *Deeds. Intention to deliver does not dispense with manual delivery.*

An intention to deliver a deed does not dispense with delivery, there must be an act showing a delivery. *Ib.*

See SPECIFIC PERFORMANCE.

LANDLORD AND TENANT.

Inducing tenant to breach contract.

The mere hiring of a tenant, who had already broken his contract with his landlord before he had entered upon such contract, was not a violation of Code 1906, section 1146 (Hemingway's Code, section 874), penalizing efforts to persuade tenant to breach his contract. *Evans* v. *State*, 252.

LAWS CITED AND CONSTRUED.

Ch. 93, sec. 12 (1892). Taxation. Disallowance of assessment by supervisors as res judicata. *Robertson* v. *U. S. Nursery Co.*, 14.

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LAWS CITED AND CONSTRUED.

LAWS CITED AND CONTINUED—Continued.

Ch. 98, secs. 5, 6 (1910). Taxation. Duties of board of supervisors when ordered by tax commission to increase value of classes property stated. *Taylor et al.* v. *State ex rel.*, 771.

Ch. 109 (1908). Criminal law. Duplicate detention warrant sufficient for detention of convict. *Ex Parte Moody*, 313.

Ch. 111 (1910). Appeal and error. Stenographer's notes not filed pursuant to notice given within thirty days after adjournment of term will be stricken from record. *White et al.* v. *Board of Sup'rs*, 434.

Ch. 135 (1910). Jury. Statute making negligence and contributory negligence jury questions has no application in equity case. *Boyd et al.* v. *Applewhite et al.*, 879.

Ch. 135 (1910). Negligence. Comparative negligence statute applies to action by husband for wife's personal injuries. *Brahan* v. *Meridian Light & Ry. Co.*, 269.

Ch. 147 (1914). Municipal corporations. Statute authorizing city to issue bonds for hospital not unconstitutional. *Feemste* v. *City of Tupelo*, 733.

Chs. 149, 166 (1908, 1919). Venue. Joint action may be brought where either defendant resides. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

Ch. 162, 1914, ch. 119, 1908. Commerce. Operation of cotton gin as incident to purchase of cotton seed for interstate shipment not interstate commerce. Monopolies. Attempting to destroy competition in cotton ginning by putting down price not unlawful. *Crescent Cotton Oil Co.* v. *State ex rel.*, 615.

Ch. 186 (1916). Schools and school districts. Compensation of superintendent and other employees of district not dependent on license. *Lander* v. *Tolbert*, 592.

Ch. 214 (1914). Action. Action for death of wife and daughter in same accident may be joined. *Hines* v. *McCullers*, 666.

Ch. 215 (1912). Railroads. Prima-facie statute does not relieve plaintiff of final burden. *Hines* v. *McCullers*, 666.

Ch. 209, sec. 2 (1918). Highways. Road district cannot incur debt unless authorized by electors. A road district is a taxing district within the statute relating to incurring debts. *Board of Highway Comm.* v. *Warren*, 295.

Ch. 239 (1916). Master and servant. Violation of statute limiting working hours gave no right of action to injured employee not working about machinery. *Handy* v. *Mercantile Lumber Co.*, 489.

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LAWS CITED AND CONTINUED—Continued.

Ch. 269 (1912, 1914). Drains. Concurrent jurisdiction of courts in either of two counties to establish. Dismissal of petition not res judicata. *Equen* v. *Arterbury*, 76.

Ch. 269 (1914). Courts. Drainage district proceeding in chancery court is a "pending suit" within statute creating new county. Jurisdiction not lost by exclusion of land from chancery court district. *Box* v. *Straight Bayou Drainage District*, 850.

Ch. 348, sec. 13 (1918). Courts. Drainage district proceeding in chancery court is a "pendign suit" within statute creating new county. *Box* v. *Straight Bayou Drainage Dist.*, 850.

Ch. 290 (1918). Statute. Act authorizing city bond issue to construct hospital not special or local. *Feemste* v. *City of Tupelo*, 733.

LIABILITY.

1. *Railroads. Failure to sound stock alarm when not proximate cause of injury.*

In a suit against a railroad company for the killing of stock, even though the engineer did not sound the stock alarm before the stock were struck, the company was not liable, where the evidence did not warrant a finding by the jury that the stock would have been frightened from the track by an earlier sounding of the stock alarm. *Hines* v. *McGhee*, 57.

2. *Banks and banking. Evidence of gross negligence in a director not sufficient to convict of knowingly receiving deposits.*

Under Code 1906, section 1169, a bank director cannot be convicted, for receiving deposits "having good reason to believe that the bank was then and there insolvent" merely upon evidence showing him to have been grossly negligent in the discharge of his duty as a director of the bank. *Buckley* v. *State*, 66.

3. *Electricity. Electric light company liable for damages for delay in furnishing service.*

An electric light company is liable for actual damages for its delay in furnishing service to a customer because the customer refused to pay for arrearage on account of service at a former residence. *Meridian Light & Ry. Co.* v. *Steele*, 114.

4. *Telegraph company. Not liable for punitive damages for acts of agent while engaged in interstate commerce.*

Punitive damages are not recoverable against a principal while engaged in interstate commerce unless the principal participated in the wrongful act of the agent, expressly or impliedly, by

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his conduct authorizing it or approving it either before or after it was committed. *W. U. Tel. Co.* v. *Norman*, 128.

5. *Stipulation limiting liability as to interstate commerce valid.* Under the act of Congress, June 18, 1910, ch. 309, a telegraph company, which had filed rates with the interstate commerce commission, was not liable for delay in the transmission of a telegram for any amount in excess of the price of the message, where the telegram so stipulated. *Ib.*

6. *Hospital. Private hospital liable for negligent injuries to patients.* A hospital conducted for private gain is liable in damages to patients for injuries resulting form negligence of the nurses and employees, since a patient is generally admitted to such a hospital under either an express or implied obligation, that he shall receive such reasonable care and attention for his safety as his mental and physical condition if known may require. *Meridian Sanatorium* v. *Scruggs*, 330.

7. *Municipal corporations. Not liable for injuries to pedestrians from projection three inches above ground at street crossings.* Where, in an action against a city by a pedestrian, the declaration alleged that plaintiff was injured while crossing at a regular street crossing, by striking her foot against a brick or stone which the city had permitted to remain firmly imbedded in the crossing and protruding two or three inches above ground, the court held that a demurrer to the declaration was properly sustained. *Pomes* v. *McComb City*, 425.

8. *Same.*
In such case it will be presumed that the plaintiff stated her case in her declaration and she could not make by her evidence a stronger or different case than that stated in her declaration. *Ib.*

9. *Master and servant. Ordinary risks assumed under Federal Employer's Liability Act. Risks not assumed.*
A servant by merely entering the service of the master assumes the ordinary risks of the service; and if he is injured solely because of them he cannot recover, but at common law, and under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master. *Y. & M. V. R. R. Co.* v. *Dees*, 438.

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LIABILITY.

LIABILITY—Continued.

10. *Highways. Members of board of supervisors not liable criminally for voting to pay contractor's claim.*

A member of the board of supervisors was not liable criminally for voting to pay the claim of a contractor for working the roads, though he had not worked the roads in accordance with the plans and specifications, where the supervisor did not act fraudulently, corruptly or through bad faith, but under the belief that the board had power to pay the claim at that time, as he was acting judicially. *Pegram* v. *State*, 564.

11. *Banks and banking. Directors and majority stockholders permitting excessive loans to directors are liable to minority stockholders for loss of their stock.*

The directors of a bank who own a majority of the capital stock and who permit improvident and excessive loans to be made by the bank's officers to the individual directors themselves, causing the bank to become insolvent and go into the hands of a receiver and the capital stock to become worthless, are liable in damages to the minority stockholders for the loss of their stock. *Boyd* v. *Applewhite*, 879.

12. *Banks and banking. Cashier is liable for losses resulting from his tortious acts.*

The cashier of a bank is liable for losses resulting from his illegal fraudulent, or tortious acts, or from his negligence. *Ib.*

13. *Banks and banking. Directors' authorization no defense as to cashier's negligence.*

The cashier is responsible for losses suffered directly from his failure to exercise reasonable skill and ordinary care and diligence in the discharge of his official duties. It is no defense that the directors, or any one of them. authorized him to do that which he knew, or ought to have known, was unauthorized or unlawful. *Ib.*

14. *Banks and banking. Cashier making excessive and unauthorized loans to a director is liable for resulting losses.*

A cashier who negotiates excessive and improvident loans to a director without authority from a majority of the board of directors is responsible for losses directly occasioned by such negligence. *Ib.*

See DAMAGES; NEGLIGENCE.

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LIMITATION OF ACTIONS—MASTER AND SERVANT.

LIMITATION OF ACTIONS.

Suit by minority stockholders for loss from directors' negligence is not governed by the three-year statute of limitations.

A suit in equity by stockholders against the directors of a bank for violation of their duties, as a result of which the bank becomes insolvent and the stock worthless, is a suit based upon negligence and the three-year statute of limitations governing actions based upon contracts, express or implied, has no application. *Boyd et al.* v. *Applewhite et al.*, 879.

See CRIMINAL LAW.

MANDAMUS.

1. *Properly dismissed when question becomes moot.*

Where before a petition for mandamus to compel a recount of votes at a primary election is heard, the election at which the petitioner desired to run as the nominee had been held, the petition was properly dismissed by the court. *State ex rel.* v. *Lawrence*, 338.

2. *Proper remedy to compel clerk of separate school district to issue warrant to pay compensation to superintendent.*

A municipal clerk is a mere ministerial officer, whose duty it is to obey an order of the trustees of a separate school district to issue a warrant in payment for service of a superintendant of the school district, and having failed to do so, the superintendent may compel his obedience to the order of the trustee by mandamus. *Lander* v. *Tolbert*, 592.

3. *Proper remedy to compel board of supervisors to increase valuation as ordered by tax commission.*

As the board of supervisors when ordered by the state tax commission to increase the valuation of certain classes of property has no discretion in the matter and the state has no plain, adequate, and speedy remedy in the ordinary course of law to compel compliance with the order, mandamus is therefore the proper remedy. *Taylor et al.* v. *State ex rel.*, 771.

MASTER AND SERVANT.

1. *Safe place rule.*

The rule which requires the master to furnish a safe place to work does not apply to cases where the prosecution of the work itself makes the place and creates the danger. International *Shipbuilding Co.* v. *Carter*, 109.

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MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

2. *General manager acting within the scope of his employment in commiting an assualt.*

Where the general manager of a plant told a bookkeeper to leave the books and accounts with him for inspection and when the bookkeeper hesitated to do so, assaulted him. In such case the general manager was acting within the scope of his employment and about his master's business and the master was liable for his acts, though he desired to inspect his individual account with the master. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

3. *Ordinary risks assumed under Federal Employer's Liability Act. Risks not assumed.*

A servant by merely entering the service of the master assumes the ordinary risks of the service; and if he is injured solely because of them he cannot recover, but at common law, and under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) risks created by the master's negligence are not assumed by the servant unless, with an actual or constructive knowledge thereof and appreciation of the danger therefrom, he voluntarily enters or continues in the employment of the master. *Y. & M. V. R. R. Co.* v. *Dees*, 438.

4. *Employees within Federal Employer's Liability Act assumed risks of switch light going out without fault, but not. for lack of oil.*

Under the Federal Employer's Liability Act (U. S. Comp. St., section 8657-8665), a railroad yard employee assumed the risk of the light on the switch stand over which he stumbled going out without fault on the employer's part, but not the risk arising from the failure of the employee in charge thereof to keep it filled with oil, unless he had actual or constructive knowledge before the injury that the light was out. *Ib.*

5. *Railroad charged with duty to keep switch lights burning.*

Although lights were primarily placed on railway switch stands to show whether the switches were open or closed their presence was an invitation to employees to use them for the purpose of locating and avioding the switch stands and it was the employer's duty to exercise reasonable care to keep them burning for this purpose. *Ib.*

6. *Risk from employer's negligence not assumed under Federal Employer's Liability Act.*

Under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) an employee does not assume a risk created by his employer's negligence merely because he had as good an opportunity as the employer of knowing of its existence. *Ib.*

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MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

7. *Servant did not assume risk under Federal Employer's Liability Act though he knew location of unlighted switch.*

Under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) a railroad employee stumbling over an unlighted stand did not assume the risk though he had worked in the yards for years and knew where the switch stand was located, where he fell over the switch in the dark, not knowing that he was in its vicinity. *Ib.*

8. *Violation of statute limiting working hours gave no right of action to injured employee not working about machinery.*

Law 1916, chapter 239 (Hemingway's Code, sections 4523-4524) making it unlawful for parties engaged in manufacturing or repairing, to work an employee more than ten hours a day applies only to employees working with or around machinery and its violation gave no right of action for injury to an employee unloading from cars lumber which other employees were taking to the planing machine. *Handy* v. *Mercantile Lumber Co.*, 489.

9. *Failure to instruct experienced employee appreciating dangers held not negligence.*

The employer is not bound by law to give instructions to an employee who from intelligence and experience, or knowledge, is able to appreciate the dangers of the employment he has undertaken. *Crossett Lumber Co.* v. *Land*, 834.

10. *Danger from creosote flying into eye obvious and a hazard of employment.*

The danger of injury to an experienced employee from creosote flying into his eye while superintending the driving of a creosoted stave in the groove of a silo was obvious from ordinary observation, and was a hazard incident to the employment. *Ib.*

11. *Failure to instruct experienced servant of obvious danger not negligence.*

The failure of the employer to instruct the employee who was an experienced builder in charge of building a silo, that creosote would injure his eye if it flew into it from a driven stave, was not negligence in the employer, *Ib.*

12. *Injury to eye of unwarned but experienced employee by flying creosote held accident resulting from his imprudence.*

The injury to the eye of the competent and experienced employee by creosote contact, under such circumstances as above, was not caused by the negligence of the employer, but was an accident resulting solely from the imprudence of the employee *Ib.*

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MONOPOLIES——MUNICIPAL CORPORATIONS.

MONOPOLIES.

1. *Attempting to destroy competition in cotton ginning by putting down price not unlawful.*

An attmpt to destroy competition by putting down the price of ginning cotton below its actual cost does not violate subdivisions (M), (N), or (O), of the anti-trust Laws 1908, chapter 119 (Hemingway's Code, section 3283), as to destroying competition in the manufacturing or sale of commodities. *Crescent Cotton Oil Co.* v. *State ex rel.*, 615.

MORTGAGES.

1. *Substitution of trustees. Validity of submission.*

Under Code 1906, section 2773 (Hemingway's Code, section 2277), providing that a sale under a deed of trust by a substituted trustee shall be void unless the substitution "appears on the record" in the office of the chancery clerk by being actually spread at large upon the record, it was a compliance with the statute where the substitution was lodged with the clerk and copied by him on the margin of the record of the deed of trust, and such notation was signed by the beneficiary under the supervision of the clerk, though the clerk did not attest the notation on the record. *King* v. *Jones*, 319.

2. *Same.*

As to whether or not the substitution of a trustee recorded by notation on the record by the beneficiary without the knowledge of the clerk is valid, is not decided by the court. *Ib.*

See EQUITY.

MUNICIPAL CORPORATIONS.

1. *Ordinance imposing penalty greater than provided by state law.*

A provision in a municipal ordinance providing that all offenses against the state penal laws amounting to a misdemeanor shall be offenses against the municipality when committed within the corporate limits, and further providing that any person violating such ordinance shall, upon conviction, be fined not less than one dollar or more than one hundred dollars, or imprisoned in jail not to exceed one year or both, is void as undertaking to impose a penalty which in some cases would be in excess of the penalty provided by the state laws for the same offense. *Cook* v. *City of Parcagoula*, 5.

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MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

2. *Same.*
But such excessive penality so provided will not invalidate the whole ordinance, since section 3419, Code 1906, provides the penalty to be imposed for violation of city ordinances. *Ib.*

3. *General ordinances on subject of offenses self operating.*
Where a municipality takes advantage of section 3410, Code 1906, by adopting a general ordinance on the subject of offenses against the municipality, such ordinance so adopted is self operating. *Ib.*

4. *Not negligence to cross in middle of block.*
Where there is no municipal ordinance prohibiting it, it is not negligent to cross a street in the middle of a block in the residence section of a city. *Braham* v. *Meridian Light & Ry. Co.*, 269.

5. *Not liable for injuries to pedestrians from projection three inches above ground at street crossings.*
Where in action against a city by a pedestrian, the declaration alleged that plaintiff was injured while crossing at a regular street crossing by striking her foot against a brick of stone which the city had permitted to remain firmly imbedded in the crossing and protruding two or three inches above ground, the court held that a demurrer to the declaration was properly sustained. *Pomes* v. *McComb City*, 425.

6. *Same.*
In such case it will be presumed that the plaintiff stated her case in her declaration and she could not make by her evidence a stronger or different case than that stated in her declaration. *Ib.*

7. *Statute authorizing city to issue bonds for hospital not unconstitutional.*
Laws 1914, chapter 147 (Hemingway's Code, sections 5968-5974), conferring on municipalities operating under. *Code charter* power to issue bonds for various purposes, including hospitals, section 2 providing the amount of bonds shall not exceed seven per cent of the assessed value of the taxable property, unless a two-thirds majority of the qualified electors assent, and then shall not exceed ten per cent of the assessed value, is a legislative regulation of the exercise of corporate power, which limitation may be raised or lowered by the legislature without destroying the charter power confered in other sections, so that Laws 1918, chapter 290, authorizing a city to issue bonds for the construction and equipment of a hospital on a majority vote, is not violative of Constitution 1890, section 80,

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calling for provision by general law to prevent the abuse by cities of the power to tax, borrow money, and contract debts, or section 89, providing that the legislature shall pass general laws under which cities may be chartered, etc. *Feemste* v. *City of Tupelo*, 733.

NEGLIGENCE.

1. *Comparative negligence statute applies to action by husband for wife's personal injuries.*

   Hemingway's Code, section 502, Laws 1910, chapter 135, providing that contributory negligence shall not bar but limit recovery, applies to a suit by a husband for injury to his wife; the term "personal injuries" in such statute being used merely to distinguish between injuries to person and injuries to property. *Brahan* v. *Meridian Light & Ry. Co.*, 269.

2. *Municipal corporations. Not negligence to cross in middle of block.*

   Where there is no municipal ordinance prohibiting it, it is not negligent to cross a street in the middle of a block in the residence section of a city. *Ib.*

3. *Railroads. Engineer required to keep lookout for stock on unfenced track in pasture.*

   An engineer, operating a locomotive on an uninclosed track through an inclosed pasture, is required to keep a lookout for stock while not engaged in other duties, and not merely to exercise reasonable care after discovery of the stock on the track in a place of danger, since the stock in such case are not trespassers on the track. *Henderson & Mathis* v. *Hines*, 339.

4. *Comparative negligence inapplicable to injury to animal by railroads.*

   The comparative negligence statute has no application to injury of personal property. *Ib.*

5. *Master and servant. Risk from employer's negligence not assumed under Federal Employers Liability Act.*

   Under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) an employee does not assume a risk created by his employer's negligence merely because he had as good an opportunity as the employer of knowing of its existence. *Y. & M. V. R. R. Co.* v. *Dees*, 438.

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NEGLIGENCE.

NEGLIGENCE—Continued.

6. *Death. Contributory negligence of beneficiary does not bar recovery.*

An action under Laws 1914, chapter 214 (Hemingway's Code, sec. 501), permitting recovery for death in cases where the injured person could have maintained an action, is not defeated by the contributory negligence of one of the beneficiaries, even to the extent of that beneficiary's interest. *Hines* v. *McCullers*, 666.

7. *Constitutional law. Contributory negligence rule may be changed by statute.*

Contributory negligence as a defense in an action for a tort is grounded on the common-law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified or abolished by statute. *Ib.*

8. *Railroads. Trial instructions on negligence erroneous unaer evidence as to negligence and causes of injury.*

An instruction as to the duty of a railroad company to maintain a highway crossing over its tracks in good condition was erroneous where the evidence did not show negligence to the maintainance of the crossing and did not show that such negligence contributed to the accident. Ib.

9. *Railroads. Trial. Instructions on duty to maintain warning sign erroneous under declaration and evidence as to cause of injury.*

In action for death of a passenger in an automobile at a railroad crossing, an instruction that the failure to maintain the sign required by Code 1906, section 4050 (Hemingway's Code, section 6674), was negligence, was erroneous, where such negligence was not alleged in the declaration, and the driver of the automobile testified that she knew of the crossing and looked for an approaching train. *Ib.*

10. *Light company held not liable for death of customer's employee caused fail of lights.*

Where a company contracted merely to furnish electrical energy for power to the operator of a linter washing and drying factory, it was not liable for the death of an employee in such factory, who, when the lights went out on account of a failure of power, fell into a vat of boiling chemicals, there being no duty on the power company toward the employee either as the agent of his employer or otherwise. *Mullican* v. *Meridian Light & Ry. Co.*, 806.

11. *Master and servant. Failure to instruct experienced employee appreciating dangers held not negligence.*

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NEGLIGENCE.

NEGLIGENCE—Continued.

The employer is not bound by law to give instructions to an employee who from intelligence and experience, or knowledge, is able to appreciate the dangers of the employment he has undertaken. *Crossett Lumber Co.* v. *Land*, 834.

12. *Master and servant. Failure to instruct experienced servant of obvious danger not negligence.*

The failure of the employer to instruct the employee who was an experienced builder in charge of building a silo, that creosote would injure his eye if it flew into it from a driven stave, was not negligence in the employer. *Ib.*

13. *Master and servant. Injury to eye of unwarned but experienced employee by flying creosote held accident resulting from his imprudence.*

The injury to the eye of a competent and experienced employee by creosote contact, under such circumstances as above, was not caused by the negligence of the employer, but was an accident resulting solely from the imprudence of the employee. *Ib.*

14. *Banks and banking. Directors not examining books and securities to determine bank's condition do not exercise ordinary care.*

The directors of a bank who never make or cause to be made an examination of the books and securities of the bank to determine its condition and the way it is being conducted do not exercise ordinary care and prudence in the management of the bank's affairs. *Boyd* v. *Applewhite* 879.

15. *Banks and banking. Directors whose negligent supervision renders minority stock valueless cannot plead ignorance.*

Directors of a bank who negligently fail to exercise reasonable control and supervision of the bank's officers cannot, as against the claims of innocent stockholders whose stock has been rendered worthless by such negligence, plead ignorance of that which by proper diligence and inquiry the directors ought to know. *Ib.*

16. *Jury. Statute making negligence and contributory negligence jury questions has no application in equity case.*

Chapter 135, Laws of 1910 (section 503, Hemingway's Code), providing "all questions of negligence and contributory negligence shall be for the jury to determine." has no controlling application in an equity case. *Ib.*

17. *Banks and banking. Liability of directors for negligence is tortious, so that they may be sued jointly or severally.*

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NEGLIGENCE—Continued.

The liability of bank directors for negligence in the performance of their duties does not rest upon contract, but is based upon the violation of duty and is in the nature of a tort, and stockholders who are injured by their negligence may sue one or several of the joint participants. *Ib.*

18. *Limitation of actions. Suit by minority stockholders for loss from directors' negligence is not governed by the three-year statute of limitations.*

A suit in equity by stockholders against the directors of a bank for violation of their duties, as a result of which the bank becomes insolvent and the stock worthless, is a suit based upon negligence and the three-year statute of limitations governing actions based upon contracts, express or implied, has no application. *Ib.*

19. *Banks and banking. Liability of directors for negligence is tortious, so that they may be sued jointly or severally.*

The liability of bank directors for negligence in the performance of their duties does not rest upon contract, but is based upon the violation of duty and is in the nature of a tort, and stockholders who are injured by their negligence may sue one or several of the joint participants. *Boyd et al.* v. *Applewhite.*, 879.

20. *Limitation of actions. Suit by minority stockholders for loss from directors' negligence is not governed by the three-year statute of limitations.*

A suit in equity by stockholders against the directors of a bank for violation of their duties, as a result of which the bank becomes insolvent and the stock worthless, is a suit based upon negligence and the three-year statute of limitations governing actions based upon contracts, express or implied, has no application. *Ib.*

See EVIDENCE; RAILROADS.

NEGOTIABLE INSTRUMENTS.

Equity. Remedy at law after alteration of one of joint signatures.

The holder and lender on a note, signed by a drug company through its president, and by an individual, had adequate remedy at law on the note as signed and delivered to him by the president of the company, even though the individual signer could defeat recovery, because he had signed the note jointly with the president of the drug company as an individual only, while the presi-

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NEGOTIABLE INSTRUMENTS—Continued.

dent had written in both his signature, the name of the drug company and after the name the abbreviation "pres." this fact not affording the holder a remedy in equity, against the individual signer. *Foote* v. *Dickson*, 186.

NOTICE.

See VENDOR AND PURCHASER.

PARENT AND CHILD.

1. *Duty of support. Enforcement by child of duty to support.*
While it is the duty of a parent to support his infant child, yet the existence of this obligation on the part of a parent does not justify a court of equity in entertaining a bill or action by the child against its father to determine in advance the amount of support and maintenance and compel obedience to its orders in premises by imposing a lien upon property of the parent or otherwise. *Rawlings* v. *Rawlings*, 140.

2. *Same.*
The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel the performance of this duty. The duty may be enforced however under statute, or directly, as where a stranger supplies an infant with necessaries and recovers therefor against the parent. *Ib.*

3. *Homestead. Rights of children.*
There is no provision in law giving a child an interest such as the wife has in the homestead or other lands of the father. *Ib.*

PARTNERSHIP.

Suit must be by or against individual partners.
Partners cannot sue or be sued by the partnership name, but the suit must be by or against the individuals composing the partnership. *McCullar & Co.* v. *Mink*, 829.

PHYSICIANS AND SURGEONS.

Evidence. Admissibility.
Where in a suit against a physician and surgeon for negligence in performing an operation, the declaration expressly charged that the defendant with want of skill and care thereby putting his possession thereof directly in issue, the testimony of other surgeons that defendant was a careful and skillful surgeon was admissible. *Shaw* v. *Klein*, 411.

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PLEADING AND PRACTICE.

1. *Burglary. Instructed acquittal proper where proof failed to show ownership as alleged.*

   In a prosecution for burglary where the indictment laid the ownership of the burglarized building in a railroad company, a corporation, but the evidence failed to show that such railroad company was either a *de jure* or *de facto* corporation, the court should have given a peremptory instruction for the acquittal of the defendant. *House* v. *State*, 43.

2. *Criminal law. Petition for writ of error coram nobis taken as true on demurrer.*

   A demurrer to a petition for a writ of error *coram nobis* admits all facts well stated or pleaded in the petition. *Hawie* v. *State*, 197.

3. *Criminal law. Writ of coram nobis applies to reverse conviction of one insane at trial.*

   A circuit judge has power, after the expiration of a term, to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case, where it appears that the defendant was insane at the time of the trial, and the fact was not made known at the trial, and upon the assignment of such error in fact, if disputed by the state, to cause a jury to be impaneled in term to try such issue; and the venue for the trial of such issue may be changed to another court but the change carries the whole case. *Ib.*

4. *Venue. Defendant may not apply for change of venue after pleading general issue.*

   Under the rules of pleading and practice a defendant who has filed the plea of general issue accepts the venue, and will not be allowed, especially after a year's time to withdraw the plea and make application for a change of venue which he has waived. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

5. *Same.*

   There may be an exception to this rule, where the trial judge in his discretion should deem it manifestly just to allow such withdrawal and grant a change of venue. *Ib.*

6. *State revenue agent suing for delinquent taxes pending appeal from assessment has no right to commissions.*

   Under Code 1906, section 81 (Hemingway's Code, section 61), authorizing appeal from assessments by the board of supervisors, and section 4310, providing that collection of taxes shall not be delayed by appeal, a state revenue agent may not recover commissions for delinquent taxes paid by a bank after suit

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PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

brought by the agent to compel payment, but before trial, where at the time of such suit an appeal by the bank from the assessment of such tax was pending. *Harrison County* v. *Robertson*, 387.

7. *Abatement and revival. Identical suit cannot be entertained at the same time.*

Two suits should not be entertained at the same time in the same court between the same parties and involving the same demand *Ib.*

8. *Plea which states good defense to action good though not strictly a plea in abatement.*

Although a plea is denominated as a plea in abatement, the court will treat it as good on demurrer, if it states facts which defeat the action, though not strictly a plea in abatement. *Ib.*

9. *Action. Action for death of wife and daughter in same accident may be joined.*

Causes of action in favor of the same plaintiff and against the same defendant, of the same nature, and subject to the same character of defense and judgment may be joined in one declaration, even though the pleas thereto may be different. *Hines* v. *McCullers*, 666.

10. *Parties. Plaintiff must have legal title of choses in action at institution of suit.*

Plaintiff, in a court of law, in order to maintain a suit upon a chose in action must have the legal title to the same at the time he brings his suit and where the evidence showed that he did not acquire the title until two days after the suit was brought, the court should have given a peremptory instruction for the defendant. *Fire & Marine Ins. Co.* v. *Daniel Auto Co.*, 745.

11. *Declaration to be construed against pleader.*

A declaration is to be construed most strongly against the pleader, and the character of a contract set out as a part of it cannot be altered by any allegations or conclusions. *Mullican* v. *Meridian Light & Ry. Co.*, 806.

12. *Plea in bar setting up discharge in bankruptcy and concluding to country a joinder of issue if valid at all.*

In an action for the death of a servant against his employer and a light and power company whose negligence caused the death where defendant employer, set up his discharge in bankruptcy by plea in both concluding to the country, such plea was insufficient in law and form, and could have been stricken out or answered either by demurrer or replication and under the cir-

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PLEADING AND PRACTICE—Continued.

cumstance should have been considered as a joinder of issue if valid at all for any purpose, and motion for final judgment on it should not have been sustained. *Ib.*

13. *Partnership. Suit must be by or against individual partners.*
Partners cannot sue or be sued by the partnership name, but the suit must be by or against the individuals composing the partnership. *McCullar & Co.* v. *Mink*, 829.

14. *Justices of the peace. Refusal of circuit court on appeal to allow amendment by inserting names of partners held reversible error.*
Under section 66, Hemingway's Code (Code 1906, section 86), providing that on appeals from justice of the peace the cause shall be tried *de novo*, and under section 558, Hemingway's Code (section 775, Code 1906), providing that the court shall have full power to allow all amendments to pleadings or proceedings at any time before verdict so as to bring the merits to trial, etc., a suit in a partnership name may be amended in the circuit court by inserting the names of the partners and the refusal of the circuit court to allow such amendment on application therefor is reversible error. *Ib.*

See ACTIONS— RIGHT AND CAUSE; EQUITY.

PRINCIPAL AND AGENT.

1. *Knowledge of purchaser's agent as to title is knowledge of purchaser.*
Notice or knowledge by an agent who is examining the title or making a purchase for a principal acquired at such time, is notice to and equivalent to knowledge by such buyer. *Biles* v. *Walker*, 98.

2. *Evidence. Books of railroad company.*
In a suit against a railroad company for cotton destroyed by fire while in its possession as carrier, it was error to exclude the books of the railroad company which tended to show that the cotton was delivered before the fire to a compress company according to custom and a bill of lading which constituted the compress company the agent of the shipper to receive shipment. *Ill. Cent. R. Co.* v. *Threefoot Bros. & Co.*, 468.

3. *Brokers. Employee of buyers who refused commission offer from seller's agent and acted for buyers not entitled to recover half of commission voluntarily paid their agent by sellers.*
Where the bookkeeper for buyers of a plantation did not accept the proposition of the agent for the sellers to act as sub-agent,

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PRINCIPAL AND AGENT—RAILROADS.

PRINCIPAL AND AGENT—Continued.

but refused his offer to share commissions and elected to represent his employers in an effort to buy at a lower than the list price, negotiating direct with the sellers, and acting for the buyers without intimating either to the sellers' agent or the sellers that he was representing the latter, he is not entitled to recover from the sellers' agent half of the commissions voluntarily paid such agent by the sellers. *Henry* v. *Lamensdorf*, 648.

See MASTER AND SERVANT; TELEGRAPHS AND TELEPHONES.

RAILROADS.

1. *Failure to sound stock alarm when not proximate cause of injury.*
In a suit against a railroad company for the killing of stock, even though the engineer did not sound the stock alarm before the stock were struck, the company was not liable, where the evidence did not warrant a finding by the jury that the stock would have been frightened from the track by an earlier sounding of the stock alarm. *Hines* v. *McGhee*, 57.

2. *Evidence making origin of fire question for the jury.*
Where in a suit to recover damages against a railroad company for damages for the loss of a warehouse by fire, the evidence, by a process of exclusion of all other probable causes of the fire, together with evidence tending to show with a reasonable degree of certainty, that the sparks issuing from an antiquated locomotive of defendant set fire to the building, in such case the question of the origin of the fire should be submitted to the jury under the instruction of the court. *L., L. & G. Ins. Co.* v. *K. & S. E. R. Co.*, 258.

3. *Engineer required to keep lookout for stock on unfenced track in pasture.*
An engineer, operating a locomotive on an uninclosed track through an inclosed pasture, is required to keep a lookout for stock while not engaged in other duties, and not merely to exercise reasonable care after discovery of the stock on the track in a place of danger, since the stock in such case are not trespassers on the track. *Henderson & Mathis* v. *Hines*, 339.

4. *Negligence. Comparative negligence inapplicable to injury to animal by railroads.*
The comparative negligence statute has no application to injury of personal property. *Ib.*

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RAILROADS.

RAILROADS—Continued.

5. *Master and servant. Employees within Federal Employer's Liability Act assumed risks of switch light going out without fault, but not for lack of oil.*

Under the Federal Employer's liability Act (U. S. Comp. St., section 8657-8665), a railroad yard employee assumed the risk of the light on the switch stand over which he stumbled going out without fault on the employer's part, but not the risk arising from the failure of the employee in charge thereof to keep it filled with oil, unless he had actual or constructive knowledge before the injury that the light was out. *Y. & M. V. R. R. Co.* v. *Dees*, 439.

6. *Master and servant. Railroad charged with duty to keep switch lights burning.*

Although lights were primarily placed on railway switch stands to show whether the switches were open or closed their presence was an invitation to employees to use them for the purpose of locating and avoiding the switch stands and it was the employer's duty to exercise reasonable care to keep them burning for this purpose. *Ib.*

7. *Master and servant. Servant did not assume risk under Federal Employer's Liability Act though he knew location of unlighted switch.*

Under the Federal Employer's Liability Act (U. S. Comp. St. sections 8657-8665) a railroad employee stumbling over an unlighted stand did not assume the risk though he had worked in the yards for years and knew where the switch stand was located, where he fell over the switch in the dark, not knowing that he was in its vicinity. *Ib.*

8. *Carriers. Freight. Destruction by fire. Peremptory instruction.*

In a suit against a railroad company for the value of cotton destroyed by fire while in its possession as a carrier; where the evidence tended to show that the cotton had been delivered to a compress company, the shipper's agent to accept delivery, before the cotton was burned, it was error to give a peremptory instruction for the plaintiff, shipper. *Ill. Cent. R. Co.* v. *Threefoot Bros. & Co.*, 468.

9. *Trial instructions on negligence erroneous under evidence as to negligence and causes of injury.*

An instruction as to the duty of a railroad company to maintain a highway crossing over its tracks in good condition was erroneous where the evidence did not show negligence in the maintainance of the crossing and did not contribute to the accident. *Hines* v. *McCullers*, 666.

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RAILROADS—Continued.

10. *Trial. Instructions on duty to maintain warning sign erroneous under declaration and evidence as to cause of injury.*

In an action for death of a passenger in an automobile at a railroad crossing, an instruction that the failure to maintain the sign required by Code 1906, section 4050 (Hemingway's Code, section 6674), was negligence, was erroneous, where such negligence was not alleged in the declaration, and the driver of the automobile testified that she knew of the crossing and looked for an approaching train. *Hines* v. *Mc-Cullers*, 666.

11. *Prima-facie statute does not relieve plaintiff of final burden.*

Laws 1912, chapter 215 (Hemingway's Code, section 1645), making accidents caused by running trains prima facie evidence of negligence, merely places on the railroad company the burden of introducing evidence as to the operation of its trains and showing the circumstances surrounding the infliction of the injury and after such evidence has been introduced, the burden then remains with the plaintiff to establish negligence by a preponderance of the evidence. *Ib.*

See PRINCIPAL AND AGENT.

RELATIONSHIP.

See JUDGES.

RES ADJUDICATA.

Drains. Dismissal of petition not res judicata.

The action of a chancery court in dismissing a drainage petition does not render the matter *res adjudicata* so as to preclude favorable action by the chancery court of another county on substantially the same petition, especially since Laws 1912, ch. 269, section 4, provides that engineers' reports, surveys, etc., in the first proceeding shall be paid for as part of the cost in a subsequent proceeding. *Equen* v. *Arterbury*, 76.

SALES.

See TAXATION.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Evidence. Court judically knows that there is a principal for each school but only one superintendent in district.*

It is a matter of common knowledge that in a number of separate municipal school districts composed of the larger cities and towns

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SCHOOLS AND SCHOOL DISTRICTS—Continued.

of the state, there are a number of separate schools and that in each one of these schools there is a principal, while for all of the schools there is one superintendent. *Lander* v. *Tolbert*, 592.

2. *Trustees of separate school district have management of superintendent elected by them.*

Under Code 1906, section 4525 (Hemingway's Code, section 7345), the trustees of separate school districts have absolute control and management of the superintendent elected by them and have the right to prescribe his duties, fix his term of office and the amount of his salary and in what manner it shall be paid. *Ib.*

3. *Compensation of superintendent and other employees of district not dependent on license.*

Under Code 1906, section 4525 (Hemingway's Code, section 7345) and Laws 1916, chapter 186 (Hemingway's Code, section 7348), the only employees of a separate school district that are in any wise brought under control or supervision of the county superintendent of education are teachers and principals, and hence the superintendent of a separate school district, librarian, janitor or other employee, need not hold a teacher's license, and they do not need any order from the county superintendent in order to be entitled to their compensation. *Ib.*

4. *Mandamus. Proper remedy to compel clerk of separate school district to issue warrant to pay compensation to superintendent.*

A municipal clerk is a mere ministerial officer, whose duty it is to obey an order of the trustees of a separate school district to issue a warrant in payment for service of a superintendent of the school district and having failed to do so, the superintendent may compel his obedience to the order of the trustee by mandamus. *Ib.*

SEDUCTION.

1. *Corroboration.*

In a prosecution for seduction under promise of marriage under Code 1906, section 1081 (Hemingway's Code, section 808), it is necessary that the testimony of the female seduced be corroborated by other evidence upon the three essential ingredients, of the crime, namely, promise of marriage, the act of sexual intercourse, and the previous chaste character of the prosecutrix, *King* v. *State*, 230.

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SEDUCTION.

SEDUCTION—Continued.

2. *Previous chaste character of prosecutrix question for the jury.*
In a prosecution for seduction, the question of the previous chaste character of the prosecutrix is a question for the jury. *King* v. *State*, 230.

3. *Effect of successive acts.*
Under Code 1906, section 1081 (Hemingway's Code, section 808), there can be only one seduction, each successive act of intercourse not being an offense. *Ib.*

4. *Promise of marriage. Evidence of previous chaste character.*
In order to sustain a conviction for seduction under Code 1906, section 1081 (Hemingway's Code, section 808), under promises of marriage, the jury must believe that there was a promise of marriage made by the defendant to the prosecutrix, and that this caused her to yield her person to him, and they must further believe that at this time the prosecutrix was of previous chaste character. *Ib.*

5. *Sufficiency of corroboration.*
Where in a prosecution for seduction under promises of marriage, the mother of the prosecutrix testified that the accused told her that the prosecutrix "was hard to persuade but he did persuade her over, and also that he said he promised to marry her," this was sufficient to corroborate the prosecutrix upon the promise of marriage and act of intercourse. *Ib.*

6. *Previous chaste character. Sufficiency of corroboration.*
Where the attorney of accused in a prosecution for seduction asked the mother of the prosecutrix on cross-examination whether or not she was a lewd girl previous to the time of the alleged seduction and her mother replied that she was not, this was sufficient corroboration of the testimony of the prosecutrix that she was of previous chaste character. *Ib.*

7. *Burden of proof on state.*
In a prosecution for seduction under promise of marriage the burden of proof is upon the state to establish the three essential ingredients of the crime. *Ib.*

8. *Previous chastity. Proof of reputation.*
In a prosecution for seduction, it is competent for the state to prove the general reputation of the prosecutrix for chastity as one of the elements of proof of actual chastity. *Ib.*

9. *Evidence of declarations of prosecutrix in travail.*
In a prosecution for seduction, it was error to permit the mother of the prosecutrix to testify over objection, that the prosecutrix

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SEDUCTION—Continued.

stated while in travail that accused was the father of the child, where it was not contended that the prosecutrix became pregnant as the result of the first act of intercourse, but that her pregnancy was caused several weeks later though such testimony would be admissible in a bastardy proceeding. *Ib.*

10. *Misleading instruction.*

In a prosecution for seduction it was error to instruct the jury to convict "if they believe that defendant did have intercourse with the prosecutrix at a time she was of previous chaste character at any time within two years prior to the date named in the indictment as charged in the indictment" such an instruction should have stated that such intercourse was had under promise of marriage, or should have used the word "seduce" to make clear that seduction and not intercourse, was the question. *Philip* v. *Dana*, 697.

SERVICE.

Justice of the peace. Service of summons by deputy of regular constable insufficient.

Where in a suit before a justice of the peace, it appeared that the summons for the defendant was not executed by the constable, but by a person claiming to act as the constable's deputy and the record contained no evidence of the appointment of such person either as a deputy constable or as a special constable, the service was unauthorized; the presumption that such person was a special constable appointed by the justice under Code 1906, section 2732 (Hemingway's Code, section 2231), not being tenable, since the return of service, clearly showed that the person serving the summons did not claim to be acting as a special constable, but as a deputy of the regular constable. *Postal Telegraph-Cable Co.* v. *Thompson*, 379.

SPECIFIC PERFORMANCE.

1. *Back taxes on capital stock invested in property taxed valid. sufficient.*

Where the contract for the sale of land which consisted of correspondence between the parties only described the lands as vendor's land in a certain section and so far as vendor's letters were concerned only as her one hundred and sixty acres in a certain county, there was not sufficient certainty in the description to entitle the purchaser to specific performance. *Philp* v. *Dana*, 697.

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SPECIFIC PERFORMANCE—TAXATION.

SPECIFIC PERFORMANCE—Continued.

2. *Acceptance of offer not specifying details and requiring acts not in offer is insufficient.*
Where the previous correspondence between the parties had not specified all of the terms for the sale of land, even the purchaser's name not being mentioned, and the final acceptance required the vendor to send the deed to a bank where the purchaser resided to deliver on the payment of the money and delivery of the notes, the contract cannot be specifically enforced. *Philip* v. *Dana*, 697.

3. *Same.*
Before specific performance will be decreed, the tender of performance on the part of the buyer, that is to say, the payment of the money and the delivery of the notes, must be made to the other party at her place of business or residence. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION.

"Corporations" as used in statute defined.
Ordinarily the term "corporation" as used in a statute means a private corporation. *Feemste* v. *City of Tupelo*, 733.

See CONSTITUTIONAL LAW.

SUMMONS.

See SERVICE.

SUNDAY.

See CONTRACTS.

TAXATION.

1. *Back taxes on capital stock invested in property taxed valid.*
The mere fact that all the capital stock of corporation operating a plantation and nursery has been invested in real and personal property which has been assessed and subjected to taxation constitutes no bar to a back assessment upon any portion of its capital stock, where the corporation has neither been assessed upon capital stock *eo nomine*, nor paid taxes upon the value of its capital stock as such. *Robertson* v. *U. S. Nursery Co.*, 14.

2. *Taxes deduction of assessed value in back. Assessing capital stock.*
In a proceeding to back-assess the capital stock of a corporation the total assessed value of its real and personal property should be deducted from the value of its stock. *Ib.*

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TAXATION.

TAXATION—Continued.

3. *Presumption as to regularity of assessment.*
Both the state revenue agent and the tax assessor are public officers and the general legal presumption that they have regularly and accurately performed their duties must ordinarily be indulged. *Ib.*

4. *Presumption of regularity on disapproval by supervisors.*
This presumption is not affected because the board of supervisors have disapproved an assessment made by them. *Ib.*

5. *Insufficiency of evidence to overcome presumption of regularity of assessment.*
In a proceeding to back assess the capital stock of a corporation wherein it appeared that such capital stock had been invested in real and personal property which had already been subjected to taxation, since under Code 1906, section 4267 (Hemingway's Code, section 6901), it was the duty of the corporate officer to furnish information to the assessor so that the value of the stock might be ascertained with some certainty, the court held that the evidence in this case was not sufficient to overcome the *prima-facie* showing by the taxing officers that they had performed their duty in imposing the assessment under Code 1906, section 4740 (Hemingway's Code, section 7058). *Ib.*

6. *Same.*
The court held the evidence in this case sufficient to show the market value of the stock so as to allow a deduction therefrom of the total assessed value of the real and personal property. *Ib.*

7. *Disallowance of assessment by supervisors as res judicata.*
Where the board of supervisors had disallowed a back assessment of the capital stock of a corporation while sitting in one of the two districts of the county in violation of Laws 1892, chapter 93, section 12, this did not support a plea of *res adjudicata* in a subsequent back assessment proceeding directed against the same stock at a sitting in the proper district of the county. *Ib.*

8. *A road district is a taxing district within the statute relating to incurring debts.*
Under Laws 1918, chapter 209, section 2, prohibiting the incurring of interest-bearing debts unless authorized by a vote of the majority of electors a road district is a taxing district. *Board of Highway Comm.* v. *Warren*, 295.

9. *State revenue agent may sue for unpaid taxes.*
The state revenue agent has the right "to proceed by suit in the

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TAXATION.

TAXATION—Continued.

proper court for past due and unpaid taxes of any kind." *Harrison County* v. *Robertson*, 387.

10. *Voluntary payment of taxes to tax collector after suit brought by revenue agent does not defeat right of agent to commission.*
Voluntary payment of taxes by deliquent taxpayers to the tax collector, instead of to the revenue agent, makes no difference in the right of the revenue agent to demand his commissions, provided only that the taxes were paid as a result of a demand and litigation instituted by the revenue agent. *Ib.*

11. *State revenue agent suing for delinquent taxes pending appeal from assessment has no right to commissions.*
Under Code 1906, section 81 (Hemingway's Code, section 61), authorizing appeal from assessments by the board of supervisors, and section 4310, providing that collection of taxes shall not be delayed by appeal, a state revenue agent may not recover commissions for delinquent taxes paid by a bank after suit brought by the agent to compel payment, but before trial, where at the time of such suit an appeal by the bank from the assessment of such tax was pending. *Ib.*

12. *Filing list of lands sold at special sale thirty four days thereafter not "immediately" under the statute.*
Under Code 1906, section 4367 (Hemingway's Code, section 7006), requiring that the list of lands sold for taxes at a special sale should be filed with the chancery clerk "immediately," the word "immediately" means as soon as practicable under the circumstances and where such list was short and could easily have been prepared and filed within a few days after the sale, the filing of such list thirty-four days after the sale was not a compliance with the statute. *Fairly* v. *Albritton*, 714.

13. *Legislature may bestow power to equalize assessment as it may see fit.*
The power to equalize assessments given both the board of supervisors and the state tax commission are purely statutory. No constitutional privilege to equalize assessments is conferred upon the board of supervisors by the constitution; neither is any such power conferred upon the state tax commission. It therefore rests entirely with the legislature to bestow so much or so little of this power as it may see fit upon either board. *Taylor et al.* v. *State ex rel.*, 771.

14. *Duties of board of supervisors when ordered by tax commission to increase value of classes of property stated.*

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TAXATION—TELEGRAPH AND TELEPHONE.

TAXATION—Continued.

Under Laws 1910, chapter 98, sections 5 and 6, when a board of supervisors is notified by the state tax commission to increase the assessed valuation of any class of property, it is its duty to consider the individual assessments of taxpayers whose property is affected by the order; but if its equalization of the assessment among individuals does not produce the ordered increase, it must apply a horizontal raise to all property of the class. *Ib.*

15. *When tax commission orders increase in valuation board of supervisors has no discretion.*

Under Laws 1916, chapter 98, sections 5 and 6, the decision of the state tax commission in ordering a board of supervisors to increase the value of certain classes of property is final and the board of supervisors have no discretion about making the increase. *Ib.*

16. *Order of state tax commission to board of supervisors to increase valuation construed.*

An order of the state tax commission to the board of supervisors to increase the valuation of certain classes of property "overvaluing no property and equalizing the assessment so that every assessment will bear an equal proportion to value," merely meant that they must not overvalue any property of the individual, when considered in connection with the value of similar property of other individuals in the county. *Ib.*

17. *Mandamus. Proper remedy to compel board of supervisors to increase valuation as ordered by tax commission.*

As the board of supervisors when ordered by the state tax commission to increase the valuation of certain classes of property has no discretion in the matter, and the state has no plain, adequate, and speedy remedy in the ordinary course of law to compel compliance with the order, mandamus is therefore the proper remedy. *Ib.*

TELEGRAPH AND TELEPHONE.

1. *Reasonable regulations and rules.*

The rule adopted by telegraph companies, that if a telegram is sent to its office by one of the company's messengers, such messenger acts as agent of the sender only, is a reasonable regulation and in such case the telegraph company is not liable if the message was never brought to its office by the messenger. *Collata* v. *W. U. Tel. Co.*, 47.

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TELEGRAPH AND TELEPHONE.

TELEGRAPH AND TELEPHONE—Continued.

2. *Commerce. Right and liabilities as to interstate telegram covered by federal law.*

A telegram sent from a point in one state to a point in another state is interstate commerce and in such case the right and liabilities in connection therewith depend upon the acts of congress, the contract contained on the telegraph blank, and the common-law principles accepted and enforced by the federal court. *W. U. Tel. Co.* v. *Norman*, 128.

3. *Telegraph company. Not liable for punitive damages for acts of agent while engaged in interstate commerce.*

Punitive damages are not recoverable against a principal while engaged in interstate commerce unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed. *Ib.*

4. *Punitive damages not allowed where the act is neither authorized or ratified.*

Neither under the rule of the federal court nor the rule in the state of Louisiana is the master liable in punitive damages because of a wrong committed by a servant, unless the master either authorized or ratified its commission. *Postal Telegraph Cable Co.* v. *Green*, 260.

5. *Commerce. Interstate telegrams governed as to punitive damages by federal law.*

A telegram offered for transmission from a point in this state to a point in another state was an interstate message and governed as to the recovery of punitive damages by federal law. *Postal Telegraph Cable Co.* v. *Eubanks*, 530.

6. *Punitive damages not recoverable for agent's wilful refusal to accept message unless wrong was authorized or ratified.*

Under the federal rule no recovery of punitive damages can be had on account of the wilful conduct of the servant, unless the commission of the wrong was authorized by the master, participated in by him, or ratified by him. *Ib.*

7. *Commerce. Act of telegraph company's agent in refusing to take interstate message. An interstate transaction governed by federal law.*

Where plaintiff went to defendant telegraph company's agent and stated that he wanted the agent to deliver a message to a point in another state, which the agent refused to do, the act of the agent was not wholly disconnected with interstate commerce, but was so intimately related to the proposed message, inter-

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TELEGRAPH AND TELEPHONE—Continued.

state in character, that his refusal to receive it was the act of an interstate agent in violation of a federal duty with reference to an interstate matter, and therefore controlled by the federal law as to the telegraph company's liability for punitive damages. *Ib.*

TRIALS.

1. *Insane person. Common law prevails where insanity is made known at the trial.*
There is no statute in this state which lays down the procedure cases where it is made known to the court that the defendant is insane at the time he is placed upon trial for a felony, but in such case the common law on the subject is clear and must prevail. *Howie* v. *State*, 197.

2. *Seduction. Previous chaste character of prosecutrix question for the jury.*
In a prosecution for seduction, the question of the previous chaste character of the prosecutrix is a question for the jury. *King* v. *State*, 230.

3. *Criminal law. Granting of instruction during argument.*
It was error for the court to grant an instruction for the state during the argument of counsel for the defense to the jury where he did not know of the granting of such instruction and had no opportunity to refer to the same in his argument. *Ib.*

4. *Defense of justification does not entitle defendant to open and close.*
Where the defendant files a plea of justification to an action for assault, this does not entitle him to open and close the case, since in the absence of evidence, the jury must necessarily find for the defendant and plaintiff must prove an unjustificable assault and his damages, and therefore has the affirmative. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

5. *Refusal of instruction the substance of which has already been given.*
It was not error to refuse an instruction the substance of which had already been given in other instructions. *Y. & M. V. R. R. Co.* v. *Dees*, 438.

6. *Limit to instructions.*
Trial courts are required and should only grant instructions sufficient in number and character, to guide the jury in determining the issues involved in the case on trial and they have by them accordingly, but this should not be done arbitrarily. *Ib.* the right to limit the number of instruction to be considered

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TRIALS—VENDOR AND PURCHASER.

TRIALS—Continued.

7. *Instructions should confine negligence authorizing recovery to negligence alleged.*

Where the declaration alleged negligence in the maintainance of the crossing and the operation of the train, instructions allowing recovery, if the railroad was negligent in any respect that approximately caused the accident were erroneous. *Hines* v. *McCullers*, 666.

8. *Instructions confining negligence to that alleged does not cure instructions permitting recovery for negligence not contributory to injury.*

Giving a requested instruction to find for defendant unless the jury found it negligent for failing to ring the bell did not cure the error of instructions permitting recovery for any negligence contributing to the injury, especially those permitting recovery for acts of negligence, which the evidence showed did not contribute to the accident.

See NEGLIGENCE.

TRUSTEES.

See MORTGAGES.

U. S. STATUTES CITED AND CONSTRUED.

Ch. 309. Stipulation limiting liability as to Interstate Commerce valid. *W. U. Tel. Co.* v. *Norman*, 128.

§§ 8657-8665. Master and servant. Ordinary risks assumed under Federal Employer's Liability Act. Risks not assumed. *Y. & V. R. R. Co.* v. *Dees*, 438.

§ 9601. Bankruptcy. Director is "officer" within exception of debts created by fraud or defalcation. *Boyd et al.* v. *Applewhite et al.*, 879.

VENDOR AND PURCHASER.

1. *Bona-fide purchaser.*

Under the facts in this case as set out in its opinion the court held that there was sufficient evidence to put the defendant on inquiry and that he was not a bona-fide purchaser for value without notice. *Biles* v. *Walker*, 98.

2. *Principal and agent. Knowledge of purchaser's agent as to title is knowledge of purchaser.*

Notice or knowledge by an agent who is examining the title or making a purchase for a principal acquired at such time, is notice to and equivalent to knowledge by such buyer. *Ib.*

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VENDOR AND PURCHASER—Continued.

3. *Estoppel. Giving agent apparent title to property no to be urged by purchaser with knowledge.*
The rule that equity will not relieve the principal who has voluntarily placed the title to his land in his agent, where another must suffer by reason of such fraudulent act does not apply where the purchaser had knowledge of all the facts, or sufficient facts which, if followed up, would place him in possession of all the facts as to the real ownership of land. *Ib.*

4. *Estoppel. That purchaser took land in name of agent in order to sell more readily for better price not in itself fraudulent.*
The fact that a real estate agent took the title to purchased land in the name of his agent solely for the reason that he could more readily sell the property, or sell it at a better price than if in his own name, was not in itself unlawful, or fraudulent. *Ib.*

VENUE.

1. *Defendant may not apply for change of venue after pleading general issue.*
Under the rules of pleading and practice a defendant who has filed the plea of general issue accepts the venue, and will not be allowed, especially after a year's time, to withdraw the plea and make application for a change of venue which he has waived. *Indianola Cotton Oil Co.* v. *Crowley*, 262.

2. *Same.*
There may be an exception to this rule, where the trial judge in his discretion should deem it manifestly just to allow such withdrawal and grant a change of venue. *Ib.*

3. *Joint action may be brought where either defendant resides.*
Under Code 1906, section 707, as amended by Laws 1908, chapter 166, and Laws 1919, chapter 149, requiring civil actions to be brought in the county in which the defendant or any of them may be found, but providing that a resident sued out of the county of his residence may have the venue changed, a joint action may be commenced in the county in which either of the defendants reside, and service on a defendant residing in another county is valid and binding. *Ib.*

WARRANTY.

See DEEDS; LAND AND LAND TITLES.

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